

**Pace University**  
**DigitalCommons@Pace**

---

Pace Law Faculty Publications

School of Law

---

3-9-2008

# Why Is It a Crime to Stomp on a Goldfish? Harm, Victimhood and the Structure of Anti-Cruelty Offenses

Luis E. Chiesa

*Pace Law School*, [Ichiesa@law.pace.edu](mailto:Ichiesa@law.pace.edu)

Follow this and additional works at: <http://digitalcommons.pace.edu/lawfaculty>



Part of the [Criminal Law Commons](#)

---

## Recommended Citation

Chiesa, Luis E., "Why Is It a Crime to Stomp on a Goldfish? Harm, Victimhood and the Structure of Anti-Cruelty Offenses" (2008).  
*Pace Law Faculty Publications*. Paper 480.  
<http://digitalcommons.pace.edu/lawfaculty/480>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact [cpittson@law.pace.edu](mailto:cpittson@law.pace.edu).

**WHY IS IT A CRIME TO STOMP ON A GOLDFISH? –  
HARM, VICTIMHOOD AND THE STRUCTURE OF  
ANTI-CRUELTY OFFENSES**

*Luis E. Chiesa*

**Associate Professor of Law  
Pace University School of Law**

## TABLE OF CONTENTS

Introduction.....	4
I. Animals and the Criminal Law: History and Contradictions .....	9
II. Victimhood, Consent and Harm .....	15
A. Victimhood.....	15
1. Preliminary Considerations.....	15
2. Victimhood and Anti-Cruelty Statutes.....	19
B. Consent.....	21
1. Preliminary Considerations.....	21
2. Consent and Anti-Cruelty Statutes.....	24
C. The Harm Principle .....	24
1. Preliminary Considerations.....	24
2. The Harm Principle and Anti-Cruelty Statutes .....	29
III. The Interests Sought to be Protected by Anti-Cruelty Statutes: Five Plausible Theories.....	30
A. Protection of Property .....	30
1. The Case in Favor of Conceiving Anti-Cruelty Statutes as a Way of Protecting Property Interests.....	30
2. The Case Against Conceiving Anti-Cruelty Statutes as a Way of Protecting Property Interests.....	32
B. Protection Against Emotional Harm .....	34
1. The Case in Favor of Conceiving Anti-Cruelty Statutes as a Means of Protecting Humans Against the Infliction of Emotional Harm .....	34
2. The Case Against Conceiving Anti-Cruelty Statutes as a Means of Protecting Humans Against the Infliction of Emotional Harm .....	36
C. Prevention of Future Harm to Humans .....	38
1. The Case in Favor of Conceiving Anti-Cruelty Statutes as a Means of Preventing Future Harm to Humans .....	38
2. The Case Against Conceiving Anti-Cruelty Statutes as a Means of Preventing Future Harm to Humans .....	40
D. Enforcement of Moral Views Held by a Majority of the Population.....	44
1. The Case in Favor of Conceiving Anti-Cruelty Statutes as a Means of Enforcing a Moral Principle.....	44
2. The Case Against Conceiving Anti-Cruelty Statutes as a Means of Enforcing a Moral Principle.....	45
E. Prevention of Harm to Animals.....	46
1. The Case in Favor of Conceiving Anti-Cruelty Statutes as a Means of Preventing Harm to Animals .....	46
2. The Case Against Conceiving Anti-Cruelty Statutes as a Means of Preventing Harm to Animals .....	49
IV. Activities Harmful to Animals Exempted from Punishment and the	

Structure of Criminal Offenses and Anti-Cruelty Statutes .....	50
A. The Claim.....	50
B. A Primer on the Conceptual Structure of Criminal Offenses.....	52
1. The Inculpatory vs. Exculpatory Dimension of Punishable Crimes and the Offense/Justification Distinction.....	52
2. The Communicative Significance of the Offense/Justification Distinction.....	53
a. Harmful vs. Non-Harmful Legal Conduct .....	53
b. Reasons and the Offense/Justification Distinction.....	55
c. Regrettable vs. Non-Regrettable Lawful Acts .....	58
3. The Supra-Statutory Nature of the Offense/Justification Distinction .....	60
C. The Structure of Anti-Cruelty Offenses .....	66
1. The Ambiguity of Animal Cruelty Laws .....	66
2. Harm, Reasons and Regret in Anti-Cruelty Statutes.....	70
a. Harmful Legal Acts and Anti-Cruelty Statutes .....	70
b. “Reasons” and Anti-Cruelty Statutes .....	72
c. Regret and Anti-Cruelty Statutes .....	74
D. Why the Animal Law Scholar’s Claim is Wrong .....	77
E. Why All of This Should Matter to An Animal Rights Activist.....	79
Conclusions .....	80
A. Statutes Criminalizing Harmful Conduct Against Animals do not Primarily Seek to Protect Property Interests.....	80
B. Harm to Animals is not Criminalized Primarily as a Means of Enforcing Morality.....	82
C. Criminal Statutes that Prohibit Harm to Animals Primarily Seek to Protect Animals from Being Harmed .....	82
D. <i>People v Garcia</i> : A Second Look .....	84

## **WHY IS IT A CRIME TO STOMP ON A GOLDFISH? – HARM, VICTIMHOOD AND THE STRUCTURE OF ANTI-CRUELTY OFFENSES**

### INTRODUCTION

Animal cruelty is considered a crime in all fifty states, the District of Columbia, Puerto Rico and the Virgin Islands.<sup>1</sup> Although the punishment for abusing animals differs widely among jurisdictions, all but seven states make it a felony offense.<sup>2</sup> Some states, like New York, only make it a felony if the acts of cruelty are performed on a *companion* animal.<sup>3</sup> Others, like Pennsylvania, aggravate punishment if harm is caused to a dog, cat or zoo animal.<sup>4</sup> The criminalization of cruelty to animals is by no means an American phenomenon. Comprehensive anti-cruelty legislation has been adopted in many countries, including the United Kingdom, Holland, Australia and Argentina, to name a few.

Even though most countries seem to believe that it is desirable to criminalize cruelty to animals, the reasons that justify prohibiting such conduct are unclear. Whereas some jurisdictions appear to have been

---

<sup>1</sup> See the Humane Society of the United States fact sheet on state animal cruelty statutes as of June 2007, in [http://www.hsus.org/web-files/PDF/state\\_cruelty\\_chart.pdf](http://www.hsus.org/web-files/PDF/state_cruelty_chart.pdf).

<sup>2</sup> Animal cruelty is a misdemeanor in Alaska, Arkansas, Idaho, Mississippi, North Dakota, South Dakota and Utah. It should be noted that Mississippi has a special statute making it a felony to engage in cruelty to livestock. Companion animals and wildlife fall outside the purview of the law. *Id.*

<sup>3</sup> NY Ag. & Mkts. Law § 353-a (1).

<sup>4</sup> PA. ST 18 Pa.C.S.A. § 5511

partially motivated to enact the statutes because people who harm animals are more likely to inflict suffering on human beings, others seem to have been moved into action by a deeply felt conviction that inflicting harm on a sentient being is morally wrong. Moreover, some state laws are drafted in a manner that suggests that one of the preeminent reasons for adopting such legislation was the protection of property.

Ascertaining the reasons that justify the practice of punishing people for engaging in acts of cruelty against animals is not merely of theoretical concern. As the recently decided case of *People v. García*<sup>5</sup> demonstrates, it is difficult, if not impossible, to determine the proper scope of anti-cruelty statutes without first answering the question of why it is that such conduct is a crime in the first place. In *García*, the Appellate Division of the Supreme Court of New York had to determine whether the defendant's act of stomping on a pet goldfish, in the presence of Juan, the nine year old custodian of the fish, constituted a felony. In order to do so, the Court needed to decide whether instantaneously killing a fish by stepping on him constituted an act of "aggravated cruelty".

Since the fish died instantly, the defendant contended that he did not suffer extreme pain and that his death was caused without special depravity or sadism. Thus, he asserted that the killing was not carried out with a

---

<sup>5</sup> 812 N.Y.S.2d 66 (2006).

heightened level of cruelty.<sup>6</sup> The Court rejected the defendant's contention by pointing out that, in view of the legislative history of the statute, whether an act demonstrates aggravated cruelty depends on "the state of mind of the perpetrator".<sup>7</sup> The Court's holding also seemed to be heavily influenced by the fact that the killing of a household pet in front of a child constitutes a "sadistic and depraved act" because it is intended to "inflict emotional pain on the boy".<sup>8</sup>

By concluding that a finding of aggravated cruelty depends on whether the actor intended to make the owner of the animal suffer, the Court was suggesting that the purpose of anti-cruelty statutes is to deter people from engaging in acts that cause emotional harm to human beings and not protecting animals from unjustifiable inflictions of pain. Thus, according to *García*, the real victims in these cases are not the animals who are being mistreated, but the humans who suffer when living creatures are harmed.

This article will show that the Court's reasoning in *García* cannot withstand careful scrutiny. Concluding that anti-cruelty statutes were enacted for reasons other than protecting animals from the unwarranted infliction of pain is in tension with basic criminal law principles.

---

<sup>6</sup> Id., at 261.

<sup>7</sup> Id.

<sup>8</sup> These were the words used by the trial court to describe the defendant's act. *People v. García*, 777 N.Y.S.2d 846.

Furthermore, the best way to account for the most salient features of anti-cruelty statutes is by acknowledging that the victims to be protected by the enactment of such laws are animals, not human beings. I will do so in four parts.

Part I of provides a brief recount of the history of Anglo-American statutes prohibiting harm to animals. This historical analysis will show that many of these statutes were originally enacted as a way to protect private property. However, it will also reveal that there has been a marked trend, specially in recent times, to punish animal cruelty regardless, and sometimes despite, the property interests involved.

In Part II, the notions of harm, victimhood and consent will be explored in order to lay the groundwork for the claims that will be put forth in the remainder of the article. It is difficult to have a meaningful discussion about the interest that the law seeks to protect by criminalizing cruelty to animals without first understanding the intricate interrelationship that exists between these concepts. In light of the issues that animal cruelty statutes raise, particular attention will be paid to discussing John Stuart Mill's and H.L.A. Hart's conception of the "harm principle". The legitimacy of enacting victimless crimes and the ways in which consent can negate both harm and victimhood will also be considered.

Part III examines five different theories that might be advanced in order



to explain the interest that we seek to promote by punishing acts that are harmful to animals, namely: (1) protection of property, (2) protection against the infliction of emotional harm to those who have ties to the injured animal, (3) prevention of future harm to humans, (4) enforcement of a moral principle, and (5) protection of the animals themselves.

In Part IV I will try to explain why it is not necessarily the case, as some animal law scholars have argued, that because animal cruelty statutes allow for the infliction of harm to animals as a result of hunting, scientific and farming activities, the interest primarily sought to be protected by these laws is something other than the protection of animals. Although seductive at first glance, this argument is ultimately flawed because it is premised on a misunderstanding of the structure of criminal offenses in general and of anti-cruelty statutes in particular. Properly understood, the existence of privileges that allow people to infringe the *prima facie* norm against harming animals merely reveals that society (rightly or wrongly) believes that there are countervailing reasons that justify harming the interest sought to be protected by the offense, not that the prohibitory norm was not really designed to protect animals in the first place.<sup>9</sup>

---

<sup>9</sup> In criminal law terms, this can be restated in the following manner: the existence of a justification (i.e. self-defense or choice of evils) provides the actor with reasons that allow him to infringe the *prima facie* norm against engaging in such conduct (i.e. the “offense”). This does not mean, however, that the existence of a justification (self-defense in a homicide case, scientific tests in an animal cruelty case) *cancels* the reasons that the offense provides us for not engaging in the conduct (protecting human life in homicide,

I will conclude by arguing that we have decided to criminalize harm to animals primarily because we are concerned about the wellbeing of such creatures, not because doing so furthers some other human interest. Finally, the Court's analysis in *People v. García* will be reexamined in light of the conclusions advanced in the article.

#### I. ANIMALS AND THE CRIMINAL LAW: HISTORY AND CONTRADICTIONS

The first statute criminalizing abusive conduct towards animals was enacted in Great Britain in 1822. The law, commonly known as “Martin’s Act”, made it a crime to cruelly beat or otherwise mistreat horses, mules, cows, sheep or other cattle.<sup>10</sup> At that point in time cruelty to animals did not constitute an indictable offense at common law.<sup>11</sup> By adopting this statute, the English Parliament filled this perceived gap in the law. Thus, prior to the enactment of Martin’s Act, conduct constitutive of cruelty to animals was only deemed criminal if it satisfied the elements of some other offense made punishable at common law, such as breaches of the peace or malicious mischief.<sup>12</sup> This represented a substantial shift in the state of the law. Whereas at common law acts that inflicted unjustifiable pain on

---

protecting animals [arguably] in animal cruelty laws). See, generally, Gardner, *Fletcher on Offences and Defences*, 39 Tulsa L. Rev. 817 (2004).

<sup>10</sup> An Act to Prevent the Cruel and Improper Treatment of Cattle (Martin's Act), 1822, 3 Geo. 4, ch. 71 (Eng.).

<sup>11</sup> [State v. Bruner](#), 12 N.E. 103, 104 (Ind. 1887).

<sup>12</sup> *Id.* See also [Republica v. Teischer](#), 1 Dall. 335 (Penn. 1788).

animals were considered legal wrongs only if the creature harmed was the property of another, after the passage of the Martin Act such conduct was a crime even when the injured animal was not owned by anyone.

In the United States, as in England, mistreatment of animals was first made a crime through legislation. However, in contrast with the early statutes adopted in Great Britain, some of the anti-cruelty laws initially enacted in America only made it a criminal offense for someone to engage in abusive acts against animals not owned by the person mistreating the creature. Take, for example, the 1846 Vermont statute which made it a crime to “willfully and maliciously kill, wound, maim or disfigure any horse, or horses, or horse kind, cattle, sheep or swine, *of another person*.”<sup>13</sup> By limiting the scope of the prohibition to acts that cause harm to animals belonging to someone else, the Vermont General Assembly was making it clear that the purpose of the statute was to protect property rights, not animals. Furthermore, by only punishing cruelty against animals of commercial value, the legislature revealed that its preeminent reason for prohibiting the conduct was to proscribe acts that were perceived to adversely affect important economic interests.<sup>14</sup>

Not all anti-cruelty laws adopted in America during the 19<sup>th</sup> century were solely inspired by an interest to protect property rights. Some early

---

<sup>13</sup> [1846 Vt. Laws 34.](#)

statutes criminalized the malicious mistreatment of animals regardless of whether they were the property of someone else. Thus, an 1829 New York law made it a crime to “maliciously and cruelly beat or torture any horse, ox or other cattle, or any sheep, *whether belonging to himself or another*”.<sup>15</sup> By making the ownership question irrelevant, this law signified an important change in the legal discourse undergirding the anti-cruelty movement. Whereas laws like the 1846 Vermont statute clearly regarded the owner of the animal as the victim of the offense, statutes like the 1829 New York law seemed to turn this conception of anti-cruelty legislation on its head by implying that the legally protected interest was the animal, not the owner.

It should be noted, however, that the 1829 New York law only criminalized abusive conduct towards commercially valuable animals. This brings to light a tension in anti-cruelty statutes that remains unresolved to this day. It is not easy to reconcile the status of animals as victims with the idea that only commercially valuable creatures are worthy of protection from wanton acts of cruelty. If the purpose of prohibiting the conduct is to protect animals from the unjustifiable infliction of pain, it is difficult to understand why economic value should condition the scope of the statutes.

Unfortunately, albeit for different reasons, most modern anti-cruelty

---

<sup>14</sup> See, generally, David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1 *Detroit College of Law Review* 1 (1993).

statutes are plagued by similar incongruities. While a majority of jurisdictions have expanded the scope of anti-cruelty statutes to encompass the protection of animals that are not generally considered to be of significant economic value, most state anti-cruelty statutes discriminate between those individuals who harm a domesticated or companion animal and those who injure non-domesticated animals.<sup>16</sup> Thus, the killing of a rodent with a mousetrap inside private property is generally not considered a crime. However, causing the death of a pet hamster is. Another salient feature of modern anti-cruelty statutes is the tendency to afford heightened legal protection to dogs and cats. In the states of Alabama and Kentucky, for example, engaging in acts of cruelty towards a dog or cat is a felony. Nonetheless, performing identical acts on horses, cows, rabbits, rodents or any other animal is merely a misdemeanor.<sup>17</sup>

In view of these considerations, modern anti-cruelty statutes, much like their 19<sup>th</sup> century counterparts, are fraught with contradictions. On the one hand, the push to expand the number of animals protected by anti-cruelty statutes and the increasing tendency to protect animals irrespective of questions of ownership suggests that the purpose of adopting these laws

---

<sup>15</sup> [N.Y. Rev. stat. tit. 6, 26 \(1829\).](#)

<sup>16</sup> A couple of states have gone as far as arbitrarily excluding livestock from the definition of “animals” protected by their anti-cruelty laws Iowa Code Ann. § 717(B)(1) (West 1993 & Supp. 1998), Utah Code Ann. § 76-9-301(11)(b)(ii) (Supp. 1998) .

See <http://www.animallaw.info/articles/arus5animall69.htm>.

is to safeguard animals from unnecessary suffering. On the other hand, the different treatment that non-companion animals receive as opposed to domesticated creatures indicates that the aim of these laws is something other than the protection of animals from harm. If the objective of anti-cruelty statutes is to keep animals free from unnecessary suffering, why should it matter whether the animal is domesticated? A rodent killed by a mousetrap feels as much pain as a pet hamster killed in a similar manner. However, only harm to the latter is deemed criminal under the typical anti-cruelty law.

New York's current statute prohibiting abusive conduct towards animals, commonly known as "Buster's Law", exemplifies many of the contradictions that have been described here.<sup>17</sup> For starters, even though it is considered a crime to perform acts of cruelty against any animal, it is only a felony to engage in aggravated cruelty towards a "companion animal". Moreover, Buster's Law contains an exemption that allows people to engage in harmful acts against animals during the course of several activities, such as fishing and hunting. As a result of this provision, the killing of a trout during a recreational fishing trip does not constitute a punishable crime, whereas the killing of a pet goldfish does. In light of these considerations, it is unclear whether the chief purpose of Buster's Law

---

<sup>17</sup> Al. St. Sect. 12A-11-241.

<sup>18</sup> NY Ag. & Mkts. Law § 353-a (1)

is to protect animals from the unjustifiable infliction of pain or to deter people from engaging in acts that harm individuals with strong emotional ties to a particular animal or animals.

Unsurprisingly, in *People v. García*, the Appellate Division of the Supreme Court of New York struggled to come to grips with the conflicting rationales that seem to have underpinned the adoption of Buster's Law in particular and the enactment of anti-cruelty statutes in general. While on several occasions the Court seemed to suggest that the victim of the offense was the boy who suffered the loss of his beloved pet, on other occasions it appeared to suggest that the real victim was the fish who was unjustifiably harmed by the defendant. Complicating the matter is the fact that the Court's ruling was also influenced by the contention that cruelty to animals should be prohibited because "man's inhumanity to man often begins with inhumanity to those creatures that have formed particularly close relationships with mankind".<sup>19</sup> Consequently, the Court in *García* elaborated three distinct (and sometimes conflicting) theories of the harm that is sought to be prevented by anti-cruelty statutes: (1) harm to those who have developed emotional ties to the animal, (2) harm to the animal, and (3) the possibility of future harm to humans on the basis of a correlation between violence against animals and violence against people.

---

<sup>19</sup> *People v. García*, 777 N.Y.S.2d 846.

The purpose of the remainder of this article is to evaluate which of these differing conceptions of anti-cruelty statutes better explains and justifies our practices of blaming and punishing people for engaging in abusive conduct against animals. Before doing so, however, it is necessary to briefly examine the notions of victimhood, harm and consent.

## II. VICTIMHOOD, CONSENT AND HARM

### A. VICTIMHOOD

#### 1. PRELIMINARY CONSIDERATIONS

Generally speaking, a victim is a party against whom a person has committed a crime.<sup>20</sup> Therefore, the notions of “victimhood” and harm are intertwined. Someone is considered a victim only if he has been harmed by another person. Usually, criminal statutes prohibit conduct that causes harm to some important interest of the victim. Thus, the typical penal code contains sections that prohibit “crimes against the person”, “crimes against property”, “crimes against sexual autonomy”, and “crimes against liberty”. In each of these instances, an crime is committed when someone unjustifiably interferes with the fundamental interests of another person. In the crime of theft, for example, the offender unlawfully interferes with someone else’s right to private property. When someone commits homicide, he is unjustifiably interfering with the victim’s right to life. In the case of



rape, the perpetrator seeks pleasure by violating the victim's fundamental right to decide how and when he or she wants to engage in sexual intercourse.<sup>21</sup>

It should be noted, however, that there are many crimes whose consummation does not entail causing harm to a victim. Most drug possession offenses represent paradigmatic examples of these types of crimes. Take, for example, the offense of possessing marijuana for personal consumption. Note that this conduct in no way interferes with another person's fundamental interests. The person who commits this offense has not denied the value of someone else's life, nor has he interfered with the rights of others. Thus, there is no victim whose interests are vindicated by punishing the offender.<sup>22</sup> The perpetrator in these cases has violated a norm, to be sure, but in doing so has not victimized anyone.

When, as in the case of drug possession offenses, the perpetrator's criminal conduct does not interfere with the interests of another person, he is said to have engaged in a "victimless crime". Additional examples of offenses traditionally regarded as victimless crimes are prostitution, driving while intoxicated, and engaging in consensual sodomy.

The government may have various reasons for prohibiting victimless

---

<sup>20</sup> Markus Dubber, *Victims in the War on Crime: The Use and Abuse of Victim's Rights* 158 (NYU Press, 2002).

<sup>21</sup> Luis E. Chiesa, *Taking Victims Seriously: A Dworkinian Theory of Punishment*, \_\_\_\_ Rev. Jur. U.P.R. \_\_\_\_ (forthcoming, 2008).

crimes. Sometimes these types of offenses are created as a way of enforcing moral principles. This is most often the case when the state prohibits certain types of consensual sexual conduct. The criminalization of consensual sodomy constitutes a prime example. Even though engaging in such conduct harms neither the persons who perform the act nor third parties, it has been prohibited because many individuals consider sodomy to be an act that contravenes their religious and moral beliefs.<sup>23</sup>

Occasionally the state decides to create a victimless crime as a way to deter people from engaging in acts that may harm someone in the future. This tends to be the purpose of prohibiting the act of driving under the influence of intoxicants. Although driving while intoxicated is not harmful *per se*, those who engage in such conduct are more likely to injure someone than those who do not. In these cases the objective of the criminal sanction shifts from exacting retribution for a harm done to preventatively neutralizing dangerous individuals before they engage in harmful conduct.

Sometimes, as in the case of environmental crimes, it is unclear whether the government has created a victimless crime. Consider the offense of knowingly releasing hazardous pollutants into the air.<sup>24</sup> Engaging in this conduct does not directly interfere with the interests of others. Thus, at first glance, this offense seems to constitute a victimless crime. However,

---

<sup>22</sup> *Id.*

<sup>23</sup> See, for example, *Bowers v. Hardwick*, 478 U.S. 186 (1986).

the aggregate effect of pollution will almost certainly result in harm to our health. Hence, in the long run, we are all going to be victims of the pernicious consequences of this conduct. Due to the resulting future harm, it can be coherently argued that the offense of releasing a hazardous pollutant into the air is not a victimless crime despite the fact that such conduct does not directly harm anyone at the time the act occurs.

The legitimacy of creating victimless crimes has been increasingly called into question. As time has passed, societies have become more democratic and government less authoritarian, and the focus of the criminal law has shifted from the safeguarding of the State to the protection of persons.<sup>25</sup> Once it is accepted that the chief purpose of penal statutes is to vindicate the rights of those that have been harmed by the perpetrator's harmful conduct, it is difficult to justify punishing people for engaging in acts that do not interfere with the rights of individuals. Taking this contention seriously should lead us to question the legitimacy of creating victimless crimes, particularly when the only reason for doing so is to enforce a particular conception of morality by way of the criminal law.

This is not to say, however, that prohibiting conduct that does not cause harm to a victim is necessarily illegitimate. No one seriously believes, for example, that criminalizing the act of driving while intoxicated is

---

<sup>24</sup> 42 U.S.C.A. § 7401

<sup>25</sup> Dubber, *supra* note 20, pp. 152.

injudicious or unjustifiable. Although such conduct does not entail interference with the interests of others, the undeniable dangerousness of the act seems to provide a more than adequate reason for its prohibition. Nevertheless, in the absence of compelling reasons that point to the contrary, victimless crimes are generally considered to be at least *prima facie* or presumptively illegitimate. However, this presumption of illegitimacy can be rebutted by demonstrating that there are sound reasons for prohibiting the conduct.

## 2. VICTIMHOOD AND ANTI-CRUELTY STATUTES

It is unclear whether anti-cruelty statutes prohibit victimless crimes. If one considers that the chief purpose of these laws is to protect property rights, then it should follow that there is a legally protected victim -- the owner of the harmed creature. If conceived in this manner, animal cruelty statutes would be considered a species of the more general crime of criminal damages.

On the other hand, if one conceives laws criminalizing the mistreatment of animals as enactments that purport to deter people from inflicting suffering on those who have strong emotional ties to the creatures, the victim of the offense would be the person whose sensibilities were affected by the act of the perpetrator. This conception of victimhood seemed

to partially inform the reasoning of the court in *People v. Garcia*. By implying that the defendant's act revealed a heightened level of cruelty because the killing of the goldfish caused Juan much suffering, the court seemed to be suggesting that the victim in these cases is the individual who suffers when someone harms a creature that he holds dear.

It can also be argued that cruelty to animals is a crime because those who mistreat animals are more likely to harm human beings than those who do not. If this were the case, the purpose of punishing those who unjustifiably make animals suffer would be to neutralize dangerous individuals before they engage in conduct that could harm a human being. Under this conception, cruelty to animals would constitute a victimless crime, since the conduct is considered criminal in light of the fact that it reveals the dangerous nature of the offender and not because the act interferes with the rights of persons. In *People v. Garcia* the Court seemed to have had this conception of anti-cruelty statutes in mind when it asserted that these laws were enacted in recognition that "man's inhumanity to man often begins with inhumanity to [animals]".<sup>26</sup>

Legislation proscribing the infliction of harm on animals can also be defended on the grounds that a majority of the population considers such conduct to be immoral. If the perceived immorality of unnecessarily harming

---

<sup>26</sup> *People v. Garcia*, 777 N.Y.S.2d 846.

animals is the sole basis for criminalization of animal cruelty, offenses prohibiting such conduct would clearly constitute victimless crimes.

Finally, it might be argued that the purpose of laws that make cruelty to animals a crime is to protect the creatures from unjustifiable inflictions of pain. Under this conception of anti-cruelty statutes the victim of the offense is the animal harmed by the wrongful conduct of the perpetrator. This approach necessarily requires that we interpret the notion of “victimhood” in a broad manner so as to allow for non-humans to qualify as victims. Some criminal law theorists object to this expansion of the concept noting that only autonomous beings can have their rights violated in such a manner that it is appropriate to label them as “victims”.<sup>27</sup>

## B. CONSENT

### 1. PRELIMINARY CONSIDERATIONS

The notions of consent and victimless crimes are intertwined. As a general rule, someone is considered a victim only when he has been forced to do something that he would otherwise not wish to do. If the person consents to the act that the alleged offender wanted him to perform, we would be hard-pressed to believe that he was victimized by the offender. Therefore, a victim’s consent changes what initially appears to be an unjustifiable act of forceful subjugation into a permissible act of self-

determination.<sup>28</sup> As Professor Dubber aptly points out:

By consenting, the apparent victim rebuts the presumption of victimhood. He indicates that another's act that facially satisfies the elements of a crime does no harm to his autonomy in fact. In light of the consent, an apparent act of heteronomy is revealed as an act of autonomy.<sup>29</sup>

The transformative effect of consent is apparent in cases involving the alleged commission of a rape. In these cases, the consent of the victim transforms what would otherwise be considered a deplorable act of sexual imposition into an unobjectionable act of lovemaking.<sup>30</sup> By consenting to the conduct the person is making a conscious decision about what types of acts make his life a life worth living. Therefore, in the absence of coercion or of legal capacity to acquiesce to the act, the consenting victim is suffering no interference with his rights that need to be vindicated by the infliction of punishment.<sup>31</sup> Upon closer inspection, it turns out that punishing someone for performing an act to which the alleged victim consented is tantamount to punishing someone for committing a victimless crime. The reason for this is that if the victim consents to the act, he is not really a victim at all. Consequently, punishing the supposed offender for engaging in the consented act is as objectionable as inflicting punishment

---

<sup>27</sup> Dubber, *supra* note 20.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> On the morally transformative nature of consent, see, generally, Alan Wertheimer, *Consent and Sexual Relations*, 2 Legal Theory 89, 90 (1996).

<sup>31</sup> *Id.*

on a person who committed an act that did not cause harm to a victim.<sup>32</sup>

Despite the undeniable transformative effects of consent, courts have been slow to recognize the acquiescence of the victim as a defense to criminal liability. The reticence has been more palpable in cases involving the infliction of physical injury or death. Thus, courts have been reluctant to allow defendants to plead consent as a defense to the crime of assault. More controversially, many jurisdictions have refused to recognize an individual's informed consent to euthanasia as a defense to the crimes of murder and assisting in suicide.

Although courts have been generally unwilling to recognize the assent of the victim as a defense to a violent offense, consent is widely accepted as a defense to crimes against property. It has consistently been held that the taking of property does not constitute theft if the owner of the item consented to it.<sup>33</sup> Similarly, a defendant cannot be found guilty of criminal mischief if the owner of the property consented to its damage or destruction. Furthermore, since the owner has the right to do what he wishes with his property, he cannot be convicted of committing the offense of criminal mischief if he decides to damage his own property.<sup>34</sup>

---

<sup>32</sup> Chiesa, *supra* note 21.

<sup>33</sup> State v Fahlk, 524 N.W.2d 39 (Neb 1994), People v Smith, 120 Cal. Rptr.2d 831 (2002)

<sup>34</sup> McKinney's Penal Law § 145.00



## 2. CONSENT AND ANTI-CRUELTY STATUTES

The consent doctrine raises two important issues in the context of anti-cruelty statutes. The first matter warranting consideration is whether an animal owner's decision to inflict pain on a creature that rightfully belongs to him is (or should be) considered criminal. Also meriting consideration is whether someone who harms or kills an animal is (or should be) guilty of a crime if the owner of the creature consented to the act. The way in which we approach these issues will depend on the conception of anti-cruelty statutes that we adopt. On the one hand, the owner's decision to allow his animal to be harmed or killed should not generate criminal liability if one considers that the purpose of anti-cruelty statutes is to protect property rights. On the other hand, if one believes that the purpose of proscribing animal abuse is to protect animals from unjustifiable inflictions of pain, the owner's consent to the harmful conduct should be irrelevant.

### C. THE HARM PRINCIPLE

#### 1. PRELIMINARY CONSIDERATIONS

Closely related to the question of whether it is legitimate to punish people for committing a victimless crime is the doctrine that has come to be called the "harm principle". First elaborated by the famous philosopher John Stuart Mill, this principle has been employed as a means to limit the government's power to criminalize conduct. According to his formulation

of the doctrine, “the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others”.<sup>35</sup> As a result of this, Mill concluded that the government could not legitimately prohibit an act solely to promote the physical or moral wellbeing of the person engaging in the conduct. Furthermore, he asserted that the fact that most people consider the performance of a particular act to be wrong or unwise is not a sufficient reason to warrant criminalizing the conduct.<sup>36</sup>

Mill’s thesis was later echoed and further developed by the legal theorist H.L.A. Hart. Hart believed that to prohibit conduct merely because it is considered immoral is illegitimate because doing so would contradict fundamental liberty interests. He also stated that the distress that people feel when others conduct themselves in what they consider to be an immoral fashion cannot constitute a punishable harm, since this would be “tantamount to punishing them simply because others object to what they do; and the only liberty that could coexist with this extension of the utilitarian principle (“harm principle”) is liberty to do those things to which no one seriously objects. Such liberty plainly is quite nugatory.”<sup>37</sup> In other words, according to Hart, criminalizing acts because of their immorality is illegitimate because it assigns only trifling importance to the fundamental

---

<sup>35</sup> John Stuart Mill, *On Liberty*, 10-11 (Elizabeth Rapaport ed., 1978)

<sup>36</sup> *Id.*

right of individual autonomy.<sup>38</sup>

One important consequence of the harm principle is that it casts doubt on the propriety of criminalizing an act merely because of its dangerousness. Prohibiting such conduct is problematic because “these offenses do not proscribe harm itself, but rather the *possibility* of harm; a possibility that need not (and typically does not) materialize when the offense is committed.”<sup>39</sup> There are myriad examples of non-harmful acts that are considered criminal solely because they create risks of harms. Perhaps the most prevalent one is the criminalization of the unauthorized possession of a weapon. Although the mere possession of a weapon is not harmful to anyone, it presumably increases the risk that the possessor might use it to injure someone. The justifiability of making use of this type of offense as a way of neutralizing dangerous offenders before they engage in harmful conduct is unclear. It is safe to say, however, that the more concrete the risk sought to be prevented by the offense is, the more justifiable it is to criminalize the conduct. Conversely, as the inherent dangerousness of the conduct decreases, the reasons in favor of criminalizing the act get progressively weaker. Compare, for example, the relative merits of the decision to criminalize the possession of tools

---

<sup>37</sup> H.L.A. Hart, *Law, Liberty and Morality* 47 (1963).

<sup>38</sup> Luis E. Chiesa, *Normative Gaps in the Criminal Law: A Reasons Theory of Wrongdoing*, 10 *New Criminal L. Rev.* 1, pp. 131 (2007).

<sup>39</sup> Douglas Husak, *Crimes Outside the Core*, 39 *Tulsa L. Rev.* 755, 771 (2004).

commonly used for criminal purposes with the prohibition of the possession of weapons. Whereas most people seem to believe that criminalizing the latter is justifiable, there are considerable doubts with regards to whether prohibiting the former is proper. The key to explaining this distinction lies in the inherent dangerousness of the items involved. Thus, it has been asserted that an “account of the difference between weapons....and burglar tools...is that the former are dangerous or thought to be dangerous to all those who might come in contact with them [whereas the latter are not]”.<sup>40</sup> Since weapons pose a more serious risk of causing grave harm to others than tools, the decision to criminalize their possession is more defensible than the choice to prohibit possessing tools.

While the harm principle initially afforded courts and commentators with an effective tool with which to condemn the enactment of laws that were adopted to enforce public morality, the principle has been criticized because of the malleability and vagueness of the concept of “harm”.<sup>41</sup> Many statutes that appear to prohibit conduct solely as a way of enforcing moral principles can be easily recast as enactments that aim to prevent the causation of indirect harm. Thus, Professor Catharine MacKinnon has argued that governmental regulation of pornography, once thought to be at odds with the harm principle, can be justified on morally neutral grounds

---

<sup>40</sup> George P. Fletcher, *Rethinking Criminal Law* 200 (Oxford, 2000).

because it is harmful to women since it perpetuates sexism, promotes the subjugation of women and fosters inequality.<sup>42</sup> In a similar fashion, former New York City Mayor Rudolph Giuliani justified his crackdown on sex shops and peep shows in Times Square by focusing on the indirect societal harm that they cause, not on their immorality.

Despite its shortcomings, the harm principle serves to limit the government's power of criminalization by requiring that the state provide reasons for prohibiting conduct other than the fact that it is generally considered to be immoral. In some cases, the state can justify prohibiting conduct by pointing to its evident dangerousness (drunk driving, for example) or by demonstrating that the long term benefits of proscribing what would otherwise appear to be an innocuous act justifies criminalizing such conduct (banning certain pornographic materials as a way of curbing sexism and discrimination, for example). However, the government will occasionally not be able to provide reasons for criminalizing conduct besides its perceived immorality. The prohibition of certain sexual acts provides a case in point. In the landmark decision of *Lawrence v. Texas*, for example, the United States Supreme Court had to decide whether a law making consensual sodomy a crime violated the liberty interests protected

---

<sup>41</sup> See, generally, Berard E. Harcourt, *The Collapse of the Harm Principle*, 90 Journal of Criminal L. and Criminology 109 (1999).

<sup>42</sup> Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. C.R.-C.L. L. Rev. 1, 7 (1985).

by the 14<sup>th</sup> Amendment's Due Process Clause. In language that closely mirrors Mill's formulation of the harm principle, the Court justified striking down the statute by pointing out that "[t]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."<sup>43</sup>

## 2. THE HARM PRINCIPLE AND ANTI-CRUELTY STATUTES

The famous English jurist Lord Devlin once argued that anti-cruelty statutes were solely enacted as a way of publicly enforcing the widely shared view that unjustifiably inflicting pain on an animal is immoral.<sup>44</sup> If Lord Devlin's characterization of such laws is correct, criminalizing the mistreatment of animals would seem to violate the harm principle. This would cast doubt on the legitimacy of enacting such legislation.

Lord Devlin's conception of anti-cruelty statutes is by no means universally held. In a famous reply to Devlin, H.L.A. Hart pointed out that:

It is too often assumed that if a law is not designed to protect one man from another its only rationale can be that it is designed to punish moral wickedness or, in Lord Devlin's words, "to enforce a moral principle". Thus it is often urged that statutes punishing cruelty to animals can only be explained in that way. But it is certainly intelligible, both as an account of the original motives inspiring such legislation and as the specification of an aim widely held to be worth pursuing, to say that the law is here concerned with the *suffering*, albeit only of animals, rather than with the immorality of torturing them. Certainly no one who supports this use of the criminal law is thereby bound in consistency to admit that the law

---

<sup>43</sup> 539 U.S. 558, 577 (2003).

<sup>44</sup> Lord Devlin, *The Enforcement of Morals* 17 (1965).

may punish forms of immorality which involve no suffering to any sentient being.

Thus, anti-cruelty legislation does not violate the harm principle as long as we interpret the principle as one that allows for the justifiable imposition of punishment whenever the actor's conduct causes harm to *another sentient being* (i.e. humans and animals).

### III. THE INTERESTS SOUGHT TO BE PROTECTED BY ANTI-CRUELTY STATUTES: FIVE PLAUSIBLE THEORIES

#### A. PROTECTION OF PROPERTY

##### 1. THE CASE IN FAVOR OF CONCEIVING ANTI-CRUELTY STATUTES AS A WAY OF PROTECTING PROPERTY INTERESTS

Professor Gary Francione recently stated that, "as far as the law is concerned, animals are nothing more than commodities".<sup>45</sup> This has led him, and many others,<sup>46</sup> to conclude that, for all relevant legal purposes, animals are treated as property. As a result of this, it would be tempting to conclude that the purpose of anti-cruelty statutes is to protect the property interests that humans have in animals.

The contention that the purpose of prohibiting abusive conduct against animals is to protect property rights finds some historical support. As was discussed in Part I of this article, cruelty to animals was not a crime

---

<sup>45</sup> Gary Francione, *Reflections on Animals, Property and the Law and Rain Without Thunder*, 70 Law and Contemporary Problems 9 (2007).

<sup>46</sup> See, for example, David N. Cassuto, *Bred Meat: The Cultural Foundation of the Factory Farm*, 70 Law and Contemporary Problems 59, 77 (2007).

at common law. At the time, killing or harming an animal would be considered an offense only if doing so satisfied some other crime punishable at common law. If any such offense were to be infringed, it would typically be a crime against property such as trespass or criminal mischief. Similarly, the first anti-cruelty statute only made it punishable for someone to mistreat animals belonging to another person. Therefore, the owner of the creature was originally free to inflict as much pain on the animal as he saw fit.

Recent enactments have generally broadened the scope of anti-cruelty offenses to nominally encompass the protection of most animals, including those that are not owned by anyone. This might suggest that, contrary to their 19<sup>th</sup> century counterparts, modern anti-cruelty statutes protect interests other than property. It should be noted, however, that some aspects of these laws do seem to perpetuate the notion that anti-cruelty statutes are enacted primarily as a way of protecting private property. Consider, for example, how the protection afforded to certain animals, such as fish or birds, depends on whether they belong to someone or not. Most statutes generally authorize people to harm fish or birds if they do so while fishing or hunting. Since no one has a claim of right over these animals while they are living in the wild, at least until they catch, trap or kill them, harming them does not affect any property interest. However, the legal



protection afforded to these creatures substantially increases once the animal belongs to someone. Thus, the acquisition of property rights over these kinds of animals has a significant transformative effect. Before they become private property, many people are free to harm them. However, once someone has a claim of right over the creature, no one, with the possible exception of the owner, can lawfully mistreat the animal.

It is worth mentioning that if what is sought to be protected by anti-cruelty statutes is a property interest, the victim of such crimes would be the owner of the animal, not the creature itself. If conceived in this manner, these statutes should not be regarded as enacting a victimless crime. Furthermore, if the reason for criminalizing the mistreatment of animals is to avoid harm to property, the enactment of anti-cruelty statutes also satisfies the harm principle.

## 2. THE CASE AGAINST CONCEIVING ANTI-CRUELTY STATUTES AS A WAY OF PROTECTING PROPERTY INTERESTS

Even though a property-based conception of anti-cruelty statutes adequately explains certain features of these laws, it fails to account for some of their most distinctive characteristics. Consider the significant protection given to dogs and cats in most jurisdictions (mistreating a dog or cat is considered a felony in many states, whereas mistreating some other animal is not). The increased degree of protection provided to these animals does not depend on whether they are owned by someone. Thus, torturing a

stray dog is considered a felony in most states regardless of whether someone has a claim of right over the animal.

Property based conceptions of anti-cruelty laws are also difficult to reconcile with statutes that make it a crime to encourage dog-fighting or cock-fighting. Such conduct is considered an offense in all fifty states.<sup>47</sup> Interestingly, the act remains criminal even if the owners of the animals voluntarily decide to engage in the activity. Since these laws protect animals in circumstances in which doing so will be detrimental to the pecuniary interests of their owners, the protection conferred in this context is incompatible with the position that anti-cruelty statutes are primarily enacted as a way to advance property interests.

It should also be noted that every jurisdiction makes it criminal for the owner of a pet to mistreat his animal. The adoption of this type of legislation is at odds with a property-based conception of anti-cruelty statutes because the unqualified protection afforded to pets against harmful acts of their owners is contrary to the general principle of property law that an owner has a right to do what he wishes to his property, including destroying or damaging it.

---

<sup>47</sup> 7 U.S.C.A § 2156 (2007), NY Ag. & Mkts. Law § 351

The only U.S. jurisdiction in which cock-fighting is not considered a crime is Puerto Rico. The reason for this seems to lie in the cultural and historical significance that cock-fighting has for many people in the island, particularly those who are over 60 and live in rural areas.

## B. PROTECTION AGAINST EMOTIONAL HARM

### 1. THE CASE IN FAVOR OF CONCEIVING ANTI-CRUELTY STATUTES AS A MEANS OF PROTECTING HUMANS AGAINST THE INFLICTION OF EMOTIONAL HARM

It might be cogently argued that the chief purpose of anti-cruelty statutes is to prevent people from causing harm to persons with strong emotional ties to the mistreated animal. I will call this theory the “emotional harm” conception of animal-cruelty statutes. This conception dovetails in several important respects with the property-based approach to animal cruelty laws. Since the owners of animals often develop strong emotional ties to their animals, they will typically be the ones who suffer the most when someone unjustifiably harms their pets. Ownership, however, is not necessarily determinative of whether someone has developed a close emotional relationship with the animal. One can easily imagine instances in which the owner of the creature has no affective attachment to his pet. By the same token, one can conceive of many instances in which someone other than the owner has cultivated a close sentimental link with the animal. As a result of this, ownership is typically, though not necessarily, indicative of a significant emotional bond with the animal. However, under this conception of anti-cruelty statutes, the ultimate purpose of these laws is to protect people from suffering emotional harm, not to safeguard their property interests.

The “emotional harm” approach to animal cruelty laws is particularly apt for explaining the heightened level of legal protection that is traditionally afforded to companion animals. According to the American Society for the Prevention of Cruelty to Animals (ASPCA), companion animals are “domesticated or domestic-bred animals whose physical, emotional, behavioral and social needs can be readily met as companions in the home, or in close daily relationship with humans.”<sup>48</sup> This definition is similar to the ones adopted in the majority of jurisdictions in the United States.<sup>49</sup> Thus, by definition, companion animals are those creatures that are more likely to have close and significant ties with human beings. Consequently, if one believes that the principal aim of anti-cruelty statutes is to prevent people from engaging in conduct that can sever the strong link that unites animals and humans, it makes sense to protect companion animals more than other creatures.

So conceived, animal-cruelty statutes would seem to satisfy the harm principle, for the principal reason of criminalizing the conduct would be to avoid emotional harm to others. Furthermore, these statutes would not create victimless crimes, since there is a victim whose interests are vindicated by punishing those who infringe the norm against harming

---

<sup>48</sup> ASPCA Official Policies and Positions Sec. 2.2, at [http://www.asPCA.org/site/PageServer?pagename=pp\\_cn\\_definition](http://www.asPCA.org/site/PageServer?pagename=pp_cn_definition).

<sup>49</sup> IL ST CH 510 § 70/2.01(a), NY Ag. & Mkts. Law § 350, M.S.A §343.20, C.G.S.A. § 22-351a

animals -- the human with close ties to the creature.

This appeared to be the conception of animal cruelty laws that the lower court had in mind in *People v. García* when it seemed to suggest that the defendant's actions evinced an increased degree of cruelty because they were calculated to inflict suffering on the person with the closest emotional ties to the pet goldfish- Juan. By focusing on the impact that the perpetrator's conduct had on the boy instead of the harm that the act caused to the animal, the Court was clearly implying that the principal aim of the statute is to prevent human suffering, not to protect animals from unjustifiable inflictions of pain.

## 2. THE CASE AGAINST CONCEIVING ANTI-CRUELTY STATUTES AS A MEANS OF PROTECTING HUMANS AGAINST THE INFLICTION OF EMOTIONAL HARM

The proposition that the purpose of anti-cruelty statutes is to protect humans from emotional harm cannot be easily reconciled with the broad scope of typical animal cruelty laws. Take, for example, South Dakota's animal cruelty statute. This law makes it a crime to harm any "mammal, bird, reptile, amphibian, or fish" by engaging in any "act or omission whereby unnecessary, unjustifiable, or unreasonable physical pain or suffering is caused, permitted, or allowed to continue including acts of mutilation".<sup>50</sup> The statute protects many animals (most reptiles and

---

<sup>50</sup> S D C L § 9-29-11; S D C L § 40-1-1

amphibians) that typically do not have close daily relationships with humans. Giving legal protection to such animals is difficult to explain under an “emotional harm” approach to animal cruelty statutes. Furthermore, harming stray dogs or cats is considered a crime even if no one has developed a strong emotional bond with the animals. This is the case even if the creature harmed is despised by most or all of the members of the community. As far as the law is concerned, animals are deemed worthy of legal protection whether they are liked or not.

Finally, the emotional harm approach to animal cruelty statutes cannot satisfactorily account for the widespread prohibition of dog and cock fighting. Most of the people who participate in this type of activity treat the animals involved as either a source of income or as entertainment. Moreover, they are evidently aware of the fact that many of the animals will suffer great pain and/or death as a result of the fights. Since the people involved in these sports treat the animals involved as disposable objects that exist solely to generate money or pleasure, it cannot be said that the principal reason for criminalizing dog or cock fighting is to prevent psychological harm to those who have developed close ties to the animals. In these cases conduct is made criminal *despite* the fact that the people generally associated with these events do not suffer when the animals are in pain. Typically, the opposite seems to be true: they *enjoy* watching the

creatures suffer.

### C. PREVENTION OF FUTURE HARM TO HUMANS

#### 1. THE CASE IN FAVOR OF CONCEIVING ANTI-CRUELTY STATUTES AS A MEANS OF PREVENTING FUTURE HARM TO HUMANS

Perhaps the mainstream belief with regard to animal cruelty statutes is that they are enacted as a way of identifying and neutralizing presumptively dangerous individuals before they engage in acts that are harmful to human beings. I will dub this view the “future harm” conception of anti-cruelty statutes. The philosophical roots of this view can be traced back to Immanuel Kant, who once famously stated that “he who is cruel to animals becomes hard also in his dealings with men. We can judge the heart of a man by his treatment of animals”.<sup>51</sup>

Defenders of this approach to anti-cruelty statutes believe that criminalizing the mistreatment of animals is warranted because “[t]here is ample evidence to suggest that individuals who engage in acts of animal cruelty have a greater probability of committing acts of violence against people as compared to individuals who have no history of committing acts of violence against animals.”<sup>52</sup> This conception is so prevalent that many organizations devoted to the protection of animals have defended it in an effort to justify the enactment of broader anti-cruelty legislation. The “First

---

<sup>51</sup> Immanuel Kant, *Duties in Regard to Animals*, in *Animal Rights and Human Obligations* 23, 24 (Tom Regan & Peter Singer eds., 2d ed. 1989).

<sup>52</sup> Charlotte A. Lacroix, *Another Weapon for Combating Family Violence: Prevention*

Strike” campaign of the Humane Society constitutes one such example. The purpose of this program is to reduce animal abuse by “rais[ing] public and professional awareness about the connection between animal cruelty and other violent crime violence and to help communities identify some of the origins of violence, predict its patterns, and prevent its escalation”.<sup>53</sup>

There is significant evidence tending to demonstrate that a correlation between animal cruelty and interpersonal violence exists. Anecdotal confirmation of this link abounds. Some of the most famous serial killers, including the Hillside strangler, Son of Sam, the Boston Strangler and Ted Bundy had a history of abusing animals.<sup>54</sup> Empirical evidence also seems to substantiate the correlation. According to some studies, animal abusers are at least four times more likely to commit violent crimes or offenses against property than those who do not mistreat animals.<sup>55</sup>

Adoption of the “future harm” conception of animal-cruelty statutes should lead to punishing only those acts that have been shown to be correlated to interpersonal violence. This might explicate why it is typically not considered criminal to harm animals during the course of certain

---

*of Animal Abuse*, 4 Animal Law 1, 8 (1998).

<sup>53</sup> First Strike: The Connection Between Animal Cruelty and Human Violence, at [http://www.hsus.org/hsus\\_field/first\\_strike\\_the\\_connection\\_between\\_animal\\_cruelty\\_and\\_human\\_violence/](http://www.hsus.org/hsus_field/first_strike_the_connection_between_animal_cruelty_and_human_violence/)

<sup>54</sup> Lacroix, *supra* note 52, pp. 8.

<sup>55</sup> *Enacting and enforcing felony animal cruelty laws to prevent violence against*



activities, such as fishing, hunting and farming. Since there is no significant link between engaging in such activities and violence against people, those who believe that animal-cruelty statutes should be adopted as a way of preventing future harm to humans do not have legitimate reasons for punishing such conduct.

The *Garcia* court expressly recognized that one of the considerations that motivated the adoption of New York's anti-cruelty statute was the connection between animal abuse and violent crimes. This was such a preeminent concern of lawmakers that then Governor Pataki defended the proposed amendments to the anti-cruelty statutes by pointing out that "gruesome acts [of torture endured by animals], coupled with recent studies that reveal a correlation between violence against animals and future acts of violence against humans, underscore the need to enhance penalties for animal cruelty".<sup>56</sup>

## 2. THE CASE AGAINST CONCEIVING ANTI-CRUELTY STATUTES AS A MEANS OF PREVENTING FUTURE HARM TO HUMANS

According to the future harm conception of anti-cruelty statutes, the purpose of enacting laws criminalizing animal abuse is to identify dangerous individuals before they decide to harm a human being. If this were the case, the justifiability of adopting such laws would be questionable

---

*humans* 6 ANIMAL L. 1 (2000)

<sup>56</sup> Jennifer S. Rosa, *Recent Developments in New York Law*, 74 St. John's L. Rev. 287, 297 (2000)

because doing so would violate the harm principle. Since the possible harm sought to be prevented by criminalizing animal cruelty – future injury to human beings – does not always transpire, it cannot be held that such conduct is prohibited because it causes direct harm to others, as the harm principle would require.

Furthermore, a legislature would be creating a victimless crime if it proscribed animal mistreatment solely because of its correlation with interpersonal violence. By ascertaining that the purpose of animal cruelty statutes is to avoid injury to a victim *in the future*, the legislature is implying that the perpetrator's present conduct doesn't yet interfere with personal interests. As was previously discussed, the legitimacy of prohibiting conduct that does not violate the rights of a victim is unclear.

The future harm conception of anti-cruelty statutes inevitably leads to shifting the focus of these laws from avoiding harm to animals to neutralizing presumptively dangerous individuals. Therefore, as one commentator has suggested, the decision to criminalize abusive treatment of animals as a way to prevent possible future harm to humans is grounded on the "recognition that the solution to a violent society does not lie in the characterization of the victim but in the characteristics of the offender."<sup>57</sup> This might explain why the *Garcia* court suggested that the key to

---

<sup>57</sup> Lacroix, *supra* note 52, pp. 8.

determining whether the defendant should be convicted of a felony because his act evinced a heightened degree of cruelty required an examination of his state of mind instead of an assessment of the amount of pain inflicted on the pet goldfish. If the principal purpose of anti-cruelty laws is to prevent future harm to humans, the gradation of punishment for animal abuse should be dependent on the perceived dangerousness of the offender and not on the actual anguish endured by the creature. This is somewhat counterintuitive. Why should a finding of aggravated cruelty depend on anything other than an evaluation of the degree and extent of the suffering of the victim?

It is also worth mentioning that the future harm conception of laws proscribing animal abuse cannot satisfactorily account for two distinctive features of modern anti-cruelty legislation, namely: the criminalization of negligent mistreatment of pets and the prohibition of cock fighting. Empirical studies demonstrate that there is a correlation between intentional acts of cruelty against animals and interpersonal violence. Thus, researchers have been quick to point out that many murderers have a history of intentionally harming animals by, for example, setting them on fire.<sup>58</sup> However, no proven link exists between negligent mistreatment of pets and

---

<sup>58</sup> 6 ANIMAL L. 1, 21 *Enacting and enforcing felony animal cruelty laws to prevent violence against humans* (2000)

future acts of violence against humans.<sup>59</sup> The person who carelessly forgets to arrange to have her pet fed during a vacation is guilty of animal abuse despite the fact that performing such conduct does not substantially increase the likelihood that the pet owner will harm a human being in the future.

Similarly, encouraging cock fighting is a crime although the people involved in it are typically not more likely to engage in violent interpersonal crime than those who do not partake in such activities. The absence of a correlation between participation in cock fighting and violence against humans is particularly evident in the case of the many Latinos who view the practice of breeding and training fighting cocks as a family and cultural tradition.<sup>60</sup> It would be absurd to argue that the Latinos who engage in cock fighting are more prone to inflicting harm on humans than the average person. Thus, the future harm conception of anti-cruelty statutes is a particularly weak basis upon which to ground the criminalization of cock fighting. It seems obvious that such spectacles are banned in order to avoid unjustifiable harm to animals, not as a means of preventing future possible harm to humans.

---

<sup>59</sup> Stephen R. **Kellert** & Alan R. **Felthous**, *Childhood Cruelty Toward Animals Among Criminals and Non-Criminals*, in *Cruelty to Animals and Interpersonal Violence* 194, 208 (Randall Lockwood & Frank R. Ascione eds., 1998). This study discusses intentional acts of violence against humans and the link with violent behavior towards animals, but does not suggest negligent treatment of animals has a link with future harm to humans.

<sup>60</sup>See, *Cockfighting Still Popular in Puerto Rico* (article discussing cock fighting as a tradition and considered a gentleman's sport in country of Puerto Rico), in <http://abcnews.go.com/International/wireStory?id=2822082>

D. ENFORCEMENT OF MORAL VIEWS HELD BY A MAJORITY OF THE  
POPULATION

1. THE CASE IN FAVOR OF CONCEIVING ANTI-CRUELTY STATUTES AS A  
MEANS OF ENFORCING A MORAL PRINCIPLE

Various courts and commentators (most notably, Lord Devlin) have posited that the chief purpose of anti-cruelty legislation is to promote a moral view held by a majority of the population.<sup>61</sup> I will call this approach the “public enforcement of morality” conception of animal cruelty statutes. Proponents of this conception argue that the perceived immorality of the conduct justifies its criminalization.

This conception is appealing because most people *do* believe that unjustifiably inflicting harm on an animal is immoral. Thus, the elegance of this view lies in its simplicity. Why should we not criminalize that which most, if not all, deem to be a morally objectionable course of action?

Another advantage of the public enforcement of morality conception of anti-cruelty laws is that it can satisfactorily explain why it is generally not considered criminal to harm animals during the course of certain activities such as fishing and hunting. Since most people consider that fishing and hunting constitute instances of morally acceptable behavior, no moral principle would be promoted by proscribing such conduct.

This view of animal cruelty legislation also succeeds where most

---

<sup>61</sup> Gary Francione, *Animals, property, and legal welfarism: “Unnecessary” suffering and the “humane” treatment of animals* 46 Rutgers. L. Rev 721 (1994)

other approaches fail. The criminalization of dog and cock fighting is easily explicable under this conception. These activities were not considered criminal in the past because at that time there was no clear consensus with regards to whether or not engaging in such behavior was deemed immoral. However, as time has passed and societal values have changed, different groups of people have coalesced in decrying the immorality of animal abuse. The crystallization of this moral consensus paved the way for the proscription of the conduct in modern times.

## 2. THE CASE AGAINST CONCEIVING ANTI-CRUELTY STATUTES AS A MEANS OF ENFORCING A MORAL PRINCIPLE

The principal objection that can be leveled against the public enforcement of morality view of animal cruelty statutes is that most courts and commentators believe that the fact that a majority of the population believes that a certain act is immoral is not in itself a sufficient reason for criminalizing the conduct. The principle laid down by the Supreme Court in *Lawrence v. Texas* is worth repeating: “[t]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”

Furthermore, this conception of anti-cruelty legislation is wholly incompatible with the harm principle. Taking this principle seriously requires that we only proscribe conduct that interferes with the rights of

others. However, no one has a right to have his own moral views publicly enforced by way of the criminal law. This is the case even when a person's moral principles coincide with those held by a substantial portion of the population. People should not have to endure punishment and the deprivation of liberty and/or property that it entails just because many object to his conduct on purely moral grounds. In a tolerant and pluralistic society, something in addition to the perceived immorality of the actor's conduct must be shown before we deem that person to be a "criminal".

#### E. PREVENTION OF HARM TO ANIMALS

##### 1. THE CASE IN FAVOR OF CONCEIVING ANTI-CRUELTY STATUTES AS A MEANS OF PREVENTING HARM TO ANIMALS

Perhaps the interest sought to be protected by anti-cruelty statutes is the prevention of harm to animals. After all, these laws are typically referred to as "*animal*" cruelty statutes. The view that these laws aim to protect animals from the unjustifiable infliction of pain has much to commend it. For starters, it seems to explain the most salient features of modern anti-cruelty legislation. The decisions to criminalize the negligent mistreatment of pets and to proscribe dog and cock fighting can easily be accounted for under this conception. Since negligently mistreating animals causes them to suffer unnecessarily, it is perfectly sensible to proscribe such conduct in order to protect the creatures. Similarly, given that dogs and cocks used in

fighters endure incredible amounts of pain, there are legitimate reasons to prohibit the fights as a means of furthering the protection of the animals involved.

Moreover, contrary to the public enforcement of morality view, the conception of anti-cruelty statutes discussed in this section is compatible with the harm principle. As H.L.A. Hart has rightly pointed out, criminalizing animal abuse does not violate this principle as long as we construe it in such a way that allows for the criminalization of conduct that harms a *sentient being*. The proscription of conduct that interferes with the fundamental interests of others is universally held to be legitimate. Thus, provided that we consider animals to have interests worthy of legal protection, there should be no objection to prohibiting animal abuse. Fortunately, most people now believe that animals do have an interest in being held free from unnecessary suffering. This basic interest stems from their *sentience*, that is, from their capacity to experience pain. Since our experience has led us to conclude that feeling pain is an unpleasant occurrence, we have good reason to abstain ourselves from causing pain to other beings, whether they are human or not.

As long as anti-cruelty statutes are conceived as laws that protect animals from enduring direct suffering, they would not constitute victimless crimes. So conceived, the legally protected victim would be the creature



harm by the perpetrator's conduct. Some would object to this conceptualization of victimhood by pointing out that only human beings should qualify as victims.<sup>62</sup> This argument would only hold, however, if there were some distinctive human characteristic beyond the capacity to feel pain that might justify affording humans more legal protection than animals. Professor Dubber believes that the human capacity for exercising meaningful autonomy over their lives warrants such a differentiated treatment.<sup>63</sup> The problem with this contention is that humans are considered victims *even if they lack the capacity to meaningfully exercise their autonomy*. A newly born child, for example, has no more capacity for autonomy than a dog or a monkey. Nevertheless, if someone were to harm such a child, no one would seriously contend that he should not be considered a victim of a crime. Thus, it seems that, in cases such as these, the defining characteristic of victimhood is sentience, not autonomy.

Nonetheless, this does not mean that there are never sound reasons for legally discriminating between humans and animals. It could be coherently argued, for example, that, in light of their unique capacity for autonomy, humans should never be considered the property of anyone else. However, since animals presumably don't understand or care about notions of ownership, their interests in not being considered property are arguably

---

<sup>62</sup> See, generally, Professor Markus Dubber's conception of victimhood. He considers personhood to be a necessary condition for victimhood. Dubber, *supra* note 20.

weaker than interests humans have with regards to the same issue.

Some scholars, like Gary Francione, argue that there *is* such a thing as “animal autonomy” that should be considered worthy of legal protection.<sup>64</sup> If this were the case, the reasons for discriminating between animals and humans, at least with regards to questions about the legitimacy of owning such beings, disappear. However, one need not agree with this proposition in order to defend the notion that animals should qualify as victims. For this limited purpose, their capacity to feel pain appears to suffice.

## 2. THE CASE AGAINST CONCEIVING ANTI-CRUELTY STATUTES AS A MEANS OF PREVENTING HARM TO ANIMALS

The conception that anti-cruelty statutes are enacted as a way of protecting animals against the unjustifiable infliction of pain appears to conflict with certain features of these laws. Particularly difficult to explain under this view is the fact that it is not a punishable crime to harm an animal during the course of fishing or hunting activities. If it is really the case that these statutes aim to prevent harm to animals, what superior interest might justify harming them during the course of fishing or hunting activities?

While it may be argued that the economic and entertainment interests that are furthered by these activities justify harming the animals,

---

<sup>63</sup> Id.

<sup>64</sup> Steven M. Wise, *Drawing the Line: Science and the case for animal rights* 43-45(2002).

many will find these reasons for engaging in the conduct unsatisfying. However, it would be mistaken to conclude that, in light of these considerations, the purpose of animal cruelty statutes is not to protect animals. It might be argued that although these laws do in fact protect animals, they assign too much weight to countervailing interests that might justify an infraction of the prohibition. Thus, the problem doesn't lie with the purpose of the statute, which is by and large a salutary one, but with the scope of the reasons that might justify what would otherwise constitute a nominal infraction of the law. In order to fully understand this argument, a discussion of the structure of criminal offenses generally and of anti cruelty statutes in particular is warranted.

#### IV. ACTIVITIES HARMFUL TO ANIMALS EXEMPTED FROM PUNISHMENT AND THE STRUCTURE OF CRIMINAL OFFENSES AND ANTI-CRUELTY STATUTES

##### A. THE CLAIM

Animal law scholars frequently claim that the fact that anti cruelty statutes are riddled with exceptions that allow people to harm animals demonstrates that these statutes are enacted to ensure that humans continue to exploit such creatures rather than to protect them.<sup>65</sup> Acceptance of this proposition typically leads to odd interpretations of animal cruelty laws. Take, for example, the views espoused by Professor Taimie Bryant in a recent article. In discussing the way in which the criminal law deals with

cases involving harm caused to egg-laying chickens, she stated that:

[T]he law does not identify as “cruel” the practices that directly cause their suffering. *If the suffering of these hens is deemed “necessary” for the eggs they supply to humans, then that suffering simply doesn’t count in legal terms*, nor does the suffering of the humans who care about that suffering.”<sup>66</sup>

This reading misapprehends the conceptual structure of criminal offenses by confusing the inculpatory (whether the suffering of the hens “counts” as legally relevant harm) and exculpatory (whether there are reasons that justify the infliction of legally relevant suffering) dimensions of animal cruelty statutes. This, in turn, leads to a failure to grasp the communicative meaning of the exceptions that plague the laws prohibiting animal abuse.

In the remainder of this section I will explore the structure of punishable crimes in an attempt to both substantiate my contention that the aforementioned reading of animal cruelty offenses is misguided and to demonstrate why it is not true that the exceptions that plague these laws reveal that they are primarily enacted to further human wellbeing rather than to protect animals from unjustifiable harm.

---

<sup>65</sup> See, for example, GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 131-132 (1996).

<sup>66</sup> Taimie L. Bryant, *Trauma, Law and Advocacy for Animals*, 1 Journal of Animal Law and Ethics 63, 76 (2006) (emphasis added).

## B. A PRIMER ON THE CONCEPTUAL STRUCTURE OF CRIMINAL OFFENSES

1. THE INCULPATORY VS. EXCULPATORY DIMENSION OF PUNISHABLE CRIMES  
AND THE OFFENSE/JUSTIFICATION DISTINCTION

Punishable crimes have both an inculpatory and an exculpatory dimension.<sup>67</sup> A person that engages in conduct that satisfies the elements of an offense inculcates himself.<sup>68</sup> Thus, David incriminates himself if he kills a human being (i.e. satisfies the elements of the offense of homicide). Furthermore, a person who has performed an act that satisfies the elements of an offense has engaged in conduct that is *prima facie* wrongful. Consequently, David's act of killing a human being is, all things being equal (i.e. *prima facie*), unlawful.<sup>69</sup>

This, of course, does not mean that conduct that satisfies the elements of an offense is necessarily wrongful. An actor may escape liability despite having inculpated himself by infringing the elements of an offense if he can successfully plead a justification defense.<sup>70</sup> Therefore, if David can demonstrate that he acted in justifiable self-defense, he will not be punished even though he engaged in conduct that was *prima facie* wrongful. The presence of justificatory conditions such as self-defense or necessity

---

<sup>67</sup> See, for example, FLETCHER, *supra* note 40, at 562.

<sup>68</sup> *Id.*

<sup>69</sup> See my *Normative Gaps*, *supra* note 38, at 117-118.

<sup>70</sup> An actor can also avoid liability by pleading an excuse defense such as insanity.

transforms the actor's *prima facie* wrongful act into conduct that is, all things being considered, *not wrongful*.<sup>71</sup>

It should be noted that conduct may be considered lawful either because it does not inculcate the actor (i.e. does not satisfy the elements of an offense) or because it should be exculpated in light of the presence of circumstances which provide the actor with reasons for engaging in the *prima facie* wrongful act (i.e. the actor has a "justification defense"). It would be a mistake, however, to conclude that the actor's acquittal in both of these instances means the same thing. As I will demonstrate in the next sub-section, there is a crucial difference between conduct that is not wrongful because it does not satisfy the elements of an offense and conduct that is lawful because it is justified. This distinction proves to be crucial to a proper analysis of the structure and meaning of anti-cruelty offenses.

## 2. THE COMMUNICATIVE SIGNIFICANCE OF THE OFFENSE/JUSTIFICATION DISTINCTION

### a. HARMFUL VS. NON-HARMFUL LEGAL CONDUCT

The communicative significance of the offense/justification distinction can be illustrated by examining the difference between the acts

---

<sup>71</sup> Albin Eser, *Justification and Excuse: A Key Issue in the Concept of Crime*, in I Justification and Excuse: Comparative Perspectives 17, 37 (George P. Fletcher & Albin Eser eds., 1987).

of shooting at a piece of paper and shooting at a person in self-defense.<sup>72</sup>

The act of shooting at a piece of paper is lawful because it does not satisfy the elements of an offense made criminal by our laws. Since this conduct is not prohibited, engaging in it does not cause harm to an interest protected by law. Thus, the act of shooting at a piece of paper, like any other conduct that does not satisfy the elements of an offense, is irrelevant for the criminal law.

Shooting at a human being in self-defense is also lawful. However, in contrast with the act of shooting at a piece of paper, this type of conduct *does* satisfy the elements of an offense: assault.<sup>73</sup> Given that this conduct is prohibited, performing it interferes with an interest that is otherwise protected by the law – physical integrity. Obviously, the injury caused to the person who was shot “counts” as harm as far as the law is concerned. Therefore, the act of shooting at a person, is *relevant* for the criminal law *even though it is not wrongful because of the presence of justificatory circumstances* (i.e. self-defense).

As one can see, these acts are lawful due to very distinct reasons. The act of shooting at a piece of paper does not satisfy the elements of an

---

<sup>72</sup> This is a variation of an example proposed by one of the greatest German criminal law scholars of the 20<sup>th</sup> Century- Hans Welzel - as a way to illustrate the offense/justification distinction in HANS WELZEL, DERECHO PENAL ALEMÁN 97-98 (Juan Bustos Ramírez & Sergio Yáñez Pérez trans., 4<sup>th</sup> ed., 1997).

<sup>73</sup> This, of course, assumes that the person did not die as a result of the conduct. If he

offense. This type of conduct does not cause harm to an interest that the law seeks to protect. Hence, the law does not provide us with reasons to abstain from engaging in the act. Contrarily, the act of shooting at a person in self-defense satisfies the elements of the offense of assault and injures one of the most important interests protected by the criminal law. Since this type of conduct is harmful, the law provides us with sound reasons to not engage in the act (protecting life or physical integrity), *even if doing so would be justified*.

b. REASONS AND THE OFFENSE/JUSTIFICATION DISTINCTION

Another way of making sense of the offense/justification distinction is by examining the different manner in which these categories seek to mold human conduct. By criminalizing offenses, we aim to provide people with reasons against engaging in the prohibited course of action.<sup>74</sup> Take, for example, the offense of arson. When we prohibit the act of setting property of another on fire without his consent, we are providing the citizenry with a sound reason against engaging in this type of conduct. Thus, if Randy were to ask Ralph whether he should burn down Sasha's corn field, Ralph could coherently point to the fact that doing so would satisfy the elements of a criminal offense as a sound reason for Randy not to engage in the conduct.

---

had died, then the act would satisfy the elements of the offense of homicide.

<sup>74</sup> Gardner, *supra* note 9, at 822 (stating that prohibitory norms provide us with reasons "not to perform the prohibitory act" and, by way of example, that the "norm that prohibits promise-breaking...is [among other things] a reason not to break promises").



Contrarily, the law provides no reasons against engaging in conduct that is not constitutive of an offense. Thus, the law provides no reasons that can be advanced against Sasha's decision to burn down his own corn field in order to build a barn, for this conduct does not satisfy the elements of an offense.<sup>75</sup> Although people might have myriad grounds for opposing Sasha's decision to burn down his corn field, they cannot claim that such grounds make Sasha's decision to perform the conduct illegal.

Justifications, on the other hand, do not provide us with reasons to abstain from performing a given act. When we recognize the existence of a justification, we aim to provide people with sound reasons *in favor* of engaging in conduct that *does* satisfy the elements of an offense. Hence, justifications provide us with "legally admissible reason[s] in favour of [acting in] nonconformity with the norm".<sup>76</sup>

Suppose, for example, that Randy now asked Ralph whether he could burn down Sasha's corn field in order to create a firebreak that will prevent three homes from being engulfed by flames. This time, Ralph could respond by stating that the existence of justificatory circumstances (necessity/choice of evils) provide Randy with sound reasons to burn down the corn field, even if engaging in such conduct infringes the elements of the offense of

---

<sup>75</sup> The conduct does not satisfy neither the elements of the offense of arson nor criminal mischief, for both of these offenses require that the property that is destroyed (criminal mischief) or set in fire (arson) belong to another.

<sup>76</sup> Gardner, *supra* note 9, at 822.

arson.

It should be noted, however, that the fact that justifications provide us with good reasons for engaging in the conduct does not mean that the reasons that the offense provides against performing the conduct magically disappear.<sup>77</sup> Thus, it has been stated that:

When someone pleads a justification, she is claiming that the reasons in favour of doing as she did stand undefeated by the reasons against. The reasons against are those that make what she did an offence. **They have not gone away. They still make it an offence.** But the reasons in favour prevail and make it a justified offence (and hence one of which she should be acquitted)<sup>78</sup>

Since the reasons that the offense provides for abstaining to engage in the act are not swept away by the existence of justificatory circumstances, some “residual” reasons for not performing the conduct remain *even if the act is ultimately justified*. Consequently, although necessity provides Randy with good reasons for burning down Sasha’s corn field, the fact that doing so infringes the elements of the offense of arson still provides us with some residual reasons against performing the justified conduct. However, given that these residual reasons (saving the corn field) are not of sufficient force to outweigh the reasons in favor of engaging in the conduct that the existence of justificatory circumstances provide (saving three homes), burning down Sasha’s corn field in such a case cannot be considered

---

<sup>77</sup> Kenneth Campbell, Offence and Defence, in *Criminal Law and Justice: Essays from the W.G. Hart Workshop*, 1986, at 83 (I.H. Dennis ed., Sweet & Maxwell 1987).

criminal.

C. REGRETTABLE VS. NON-REGRETTABLE LAWFUL ACTS

While the existence of residual reasons against performing an act that is constitutive of an offense does not afford us with sufficient grounds to criminalize the conduct if it is justified, they do provide us with sound reasons to feel regret for having engaged in the conduct. We have cause to regret the conduct because, all things being considered, “[i]t would have been better still had there been no occasion to commit [the act], and hence no need to ask whether its commission was justified or not.”<sup>79</sup> Therefore, justified conduct, although lawful, is regrettable, for the harm that the infraction of the elements of the offense represents is not wiped away merely by the existence of justificatory circumstances.

In a recent article, Professors Michelle Dempsey and Jonathan Herring convincingly argued both that instances of “justified *prima facie* wrongdoing leav[e] a moral residue of regret” and that the regret thus produced has significant “rational force”.<sup>80</sup> This regret has rational force because it generates legal reasons “to prefer less wrongful alternatives to securing the values that justify the *prima facie* wrongful conduct”.<sup>81</sup>

---

<sup>78</sup> Gardner, *supra*. Note 9, at 822.

<sup>79</sup> *Id.*

<sup>80</sup> Michelle Madden Dempsey & Jonathan Herring, *Why Sexual Penetration Requires Justification*, 27 Oxford Journal of Legal Studies 467, 488 (2007).

<sup>81</sup> *Id.*

Suppose, for example, that the law does not impose a duty to retreat as a prerequisite to the use of justifiable force in self-defense. Thus, according to the law in this jurisdiction, Sandra could justifiably kill Laura in order to repel her unlawful deadly attack, even if she could have avoided injury by retreating to a safe place. However, since the act of killing Laura satisfies the elements of the offense of homicide, Sandra has good reasons (saving Laura's life) for abstaining to engage in the justifiable conduct. Although the reasons against engaging in the conduct that the offense represents are not of sufficient weight to make Sandra's justifiable use of deadly force criminal, they do provide her with motives to regret killing Laura. Furthermore, these residual "regret-causing motives" afford Sandra with reasons to attempt to avert the unlawful attack by retreating, *although it would not be criminal for her to decide to repel the attack by killing Laura in self-defense*. Curiously, the same reasons that the offense provides us against killing Laura in self-defense in the first place – the protection of human life - are the reasons that counsel in favor of attempting to avert the attack by less harmful alternatives.<sup>82</sup>

---

<sup>82</sup> Dempsey and Herring illustrate the rational force of regret by way of the following example:

Surgical cutting into a patient's body is a *prima facie* wrong, but one that may be justified in virtue of reasons generated *inter alia* by the value of the patient's life and well-being. Despite its justification, however, cutting into a patient's body is still to be regretted. This regret generates reasons for medical personnel to seek less wrongful alternatives to securing the values sought by the surgery. If, for example, the purpose

Contrarily, acts that do not satisfy the elements of an offense do not generate reasons to regret having engaged in the conduct. As a result, a person who engages in conduct that does not constitute an offense has no reasons for seeking less injurious alternatives for achieving whatever it is that he aims to attain by performing the act. Therefore, the law does not afford someone who shoots at a piece of paper reasons to feel regret for having engaged in the conduct. This, in turn, entails that there is no reason for a person to attempt to make use of other less harmful means in order to achieve whatever it is that they aim to accomplish by shooting at the piece of paper (target practice, for example).

### 3. THE SUPRA-STATUTORY NATURE OF THE OFFENSE/JUSTIFICATION DISTINCTION

On some occasions, the positive law clearly distinguishes between offenses and justifications. This is typically the case with regards to the conduct that is regulated in the comprehensive penal codes of most jurisdictions. Usually, criminal codes are divided into a “special part” and a “general part”. The special part contains the offenses whose commission is regarded as *prima facie* wrongful. The general part, on the other hand,

---

of the cutting is to perform exploratory surgery in hopes of diagnosing a source of the patient's abdominal pain, it is rationally incumbent upon the surgeon to seek less wrongful alternatives to diagnosing the source of the pain before cutting into the patient's body.

*Id.*, at 488-489.

contains a series of general doctrines of criminal responsibility that, in principle, apply to every instance of commission of an offense.<sup>83</sup> It is here where one can typically find provisions that deal with the exculpatory dimension of criminal offenses and, consequently, with justification defenses.

Since the special part of penal codes contains a long list of offenses and the general part usually contains a catalogue of justification defenses (self-defense, necessity, law enforcement duties, etc), the offense/justification distinction is often clearly reflected in the statutory law of any given jurisdiction. The New York Penal Law, for example, distinguishes between “general provisions” (i.e. the “general part”) and “specific offenses” (i.e. the “special part”).<sup>84</sup> Thus, the list of acts that are deemed to be *prima facie* illegal are regulated in the “specific offenses” part of the Penal Law, whereas the justificatory circumstances that allow us to engage in what would otherwise constitute an unlawful act are specified in the “general provisions” section of the statute. Such an organizational structure of penal laws typically makes it easier for us to differentiate between offenses and justifications. An examination of New York law reveals, for example, that

---

<sup>83</sup> Thus, the general part of many criminal codes contain provisions with regards to basic doctrines of criminal law, such as the “act requirement”, the forms of culpability (i.e. intent and negligence), attempt liability, perpetration and complicity, etc. See, generally, FLETCHER, *supra* note 40, at 393-395.

<sup>84</sup> New York Penal Law contains an additional part (Part II) that is intended to regulate sentencing practices.

whoever kills a human being in self-defense has committed the offense of homicide.<sup>85</sup> Given that this conduct is constitutive of an offense, we have sound reasons against engaging in the act. In spite of this, the use of force in self-defense is not criminal pursuant to New York law because it is justified.<sup>86</sup> Thus, although the fact that such conduct infringes the elements of an offense provides us with reasons to abstain from engaging in the act, the existence of justificatory circumstances would make such conduct one that is, on balance, not wrongful.

Unfortunately, legislative appearances can sometimes be deceiving, for criminal statutes do not always differentiate in a clear way between conduct that is not wrongful because it does not satisfy the elements of an offense and acts that are legal because they are justified. The California Penal Code provision defining the crime of murder constitutes a chief example. According to the Code, murder is “the unlawful killing of a human being...with malice aforethought”.<sup>87</sup> What makes this provision problematic is that it infelicitously conflates the inculpatory and exculpatory dimensions of the crime by specifying that murder is an “unlawful killing”. Since justified killings are, by definition, lawful, it follows that deaths that are produced as a result of the justifiable use of force do not satisfy California’s definition of murder. Thus, at first glance, one might be

---

<sup>85</sup> §125.00 N.Y. Penal Law.

<sup>86</sup> §35.15 N.Y. Penal Law.

tempted to conclude that, at least in California, causing the death of a person in self-defense *is lawful because it does not satisfy the elements of an offense*. Therefore, it might be argued that a person who kills another in self-defense has committed no *prima-facie* wrong that is in need of justification.<sup>88</sup>

Although seductive, this understanding of the offense/justification distinction is either wrong or profoundly unilluminating. If the distinction is to be of any consequence, “offenses” and “justifications” ought to be understood as conceptual categories that help us to better appreciate the general structure of punishable crimes, not as labels that can be legislatively defined in such a way that distinguishing between these categories would be a worthless endeavor. The reason why I have paid so much attention to the offense/justification dichotomy in this article is because I believe that we can learn something about the law, morality and society by understanding the distinction. Thus, by making use of the terms “offense” and “justification”, I am making broad claims about the nature and structure of punishable crimes in our society, not about the particular way in which the

---

<sup>87</sup> §187 Cal. Penal Code.

<sup>88</sup> According to this reading, justifications (i.e. self-defense) would constitute *negative elements of the offense*, rather than independent defenses that exclude the wrongfulness of the conduct without negating the elements of the offense. Some European scholars maintain that this is the best way to interpret criminal statutes. See, for example, DIEGO MANUEL LUZÓN PEÑA, CURSO DE DERECHO PENAL PARTE GENERAL 302-303 (Universitas, 1996). This position, however, has been convincingly criticized by numerous scholars. See, generally, FRANCISCO MUÑOZ CONDE & MERCEDES GARCÍA ARÁN, DERECHO PENAL PARTE GENERAL 252-253 (Tirant Lo Blanch, 2004).



legislature of California (sloppily) drafted their murder statute (or any other criminal statute).

Therefore, it is clear that the offense/justification distinction that I am referring to is supra-statutory in nature. According to this understanding of the distinction, which is widely shared by criminal theorists and legal philosophers, the way in which a statute has been drafted is not determinative when ascertaining whether conduct should be considered lawful because it is not constitutive of an “offense” or because it is “justified”.<sup>89</sup>

Since the statutory formulations of crimes can sometimes be misleading, it is necessary to elaborate supra-statutory standards that allow us to distinguish between conduct that is lawful because it does not satisfy the elements of an offense and conduct that is lawful because it is justified. In my opinion, this can be accomplished by appealing to the ideas that undergird the different ways of understanding the offense/justification distinction that have been elaborated in this section.

Previously, I attempted to demonstrate the communicative significance of the “offense” and “justification” categories by appealing to three

---

<sup>89</sup> This view was forcefully defended by the leading German criminal theorist Hans Welzel, who stated that whether the legislature decides to incorporate the criteria of justification into the definition of a crime is “irrelevant” to distinguishing between the offense and the justification. WELZEL, *supra* note 72, at 96 (asserting that “even if self-defense were to be included [as part of the definition of the crime of homicide]...the non-existence of the defense would not be transformed into a “negative” element of the

different notions – harmful vs. non-harmful lawful acts, reasons against and reasons in favor of performing an act, and regrettable vs. non-regrettable lawful conduct. I believe that these notions can also serve as heuristic devices that aid us in the sometimes difficult endeavor of distinguishing between offenses and justifications, particularly when the statutory law does not provide much guidance.

Thus, regardless of how the legislature decides to draft their criminal statutes, a promising way of distinguishing between different types of non-wrongful acts is by asking ourselves the following questions:

- (1) The conduct is lawful because: (a) no harm has been caused, or (b) although harm has been caused, the benefits caused by the act outweigh the harm produced by the conduct.
- (2) The conduct is lawful because: (a) we have no reasons to refrain from performing it, or (b) although there are reasons against engaging in the conduct, they are outweighed by reasons in favor of performing the act.
- (3) Do we have reasons to attempt to make use of other less harmful means in order to achieve what we aimed to accomplish by engaging in the lawful act? (a) no, because there are no reasons to regret having engaged in the act, or (b) yes, because there are reasons to regret having engaged in the act.

If the answer to the three questions is (a), then the conduct is lawful because it does not satisfy the elements of an offense. Contrarily, if the answer to these questions is (b), then the conduct is legal because it is

justified.

These questions provide us guidance when determining whether a killing in self-defense is not wrongful because it doesn't satisfy the elements of an offense or because it is justified. As was previously stated, the California murder provision suggests that such killings are lawful because they do not satisfy the elements of an offense. This conclusion, however, is mistaken, given that:

- (1) The conduct is lawful because, although harm has been caused (death of the aggressor), the evil wreaked by the act is outweighed by the evil avoided by the conduct (death of person unlawfully attacked).
- (2) The conduct is lawful because, although there are reasons against engaging in the conduct (protecting the life of the aggressor), they are outweighed by reasons in favor of performing the act (protecting the life of the person attacked).
- (3) We have legal reasons to attempt to make use of other less harmful means in order to achieve what we aimed to accomplish by killing the aggressor in self-defense (by retreating, for example), because there are reasons to regret having killed the aggressor.

## C. THE STRUCTURE OF ANTI-CRUELTY OFFENSES

### 1. THE AMBIGUITY OF ANIMAL CRUELTY LAWS

Now that we have explored the general structure of punishable crimes, we are in a better position to understand the particular structure of anti-cruelty statutes. Anti cruelty laws, like other criminal statutes, have an inculpatory and exulpatory dimension. Thus, a reading of these laws reveals

that they purport to both describe conduct that society considers to be *prima facie* wrongful and to illustrate circumstances in which engaging in such conduct is, all things being considered, non-wrongful. In other words, anti-cruelty statutes contain both definitions of offenses and a catalogue of justifications. The problem, as anyone who has read up to this point would suspect, is that these laws do not clearly differentiate between conduct that is not wrongful because it doesn't satisfy the elements of the offense and acts that are lawful because they are justified.

Take, for example, the Montana anti-cruelty statute. This law criminalizes a variety of acts, such as "injuring" or "killing" an animal.<sup>90</sup> However, it also states that "nothing in this section prohibits [injuring or killing an animal as result of] commonly accepted agricultural...practices".<sup>91</sup> The combined effect of these two provisions is unclear. There are a couple of plausible interpretations of this statute:

- (1) Injuring or killing an animal as a result of lawful agricultural practices is not prohibited (i.e. is "lawful") because doing so does not satisfy the elements of an offense, or
- (2) Injuring or killing an animal as a result of lawful agricultural practices is not prohibited because, although doing so satisfies the elements of an offense, it is justified.

The Texas anti-cruelty statute is plagued by a similar ambiguity. Pursuant to said law, intentionally "killing", "torturing" or "seriously

injuring” an animal is a crime.<sup>92</sup> However, “it is a defense to prosecution...that the actor [harmed the animal as a result of being] engaged in bona fide...scientific research”.<sup>93</sup> Once again, there are two possible interpretations of this statute:

- (1) Injuring or killing an animal as a result of bona fide scientific experimentation is not prohibited because doing so does not satisfy the elements of an offense, or
- (2) Injuring or killing an animal as a result of bona fide scientific experimentation is not prohibited because doing so is justified.

How should we determine which of the plausible readings of the Texas and Montana<sup>94</sup> statutes represents the best interpretation of animal cruelty laws?<sup>95</sup>

One possible way to tackle this matter would be to look for answers by parsing the statutory text. Some might believe, for example, that the fact that the Texas statute states that “it is a defense” to prosecution that the harm was caused as a result of scientific experimentation implies that this

---

<sup>90</sup> MT. ST. 45-8-211(1)(a).

<sup>91</sup> MT. ST. 45-8-211(4)(b).

<sup>92</sup> Tex. Penal Code Ann. §42.09(a)(1) & (a)(5).

<sup>93</sup> Tex. Penal Code Ann. §42.09(b).

<sup>94</sup> Since the Montana and Texas anti-cruelty statutes are representative of most animal cruelty laws in the United States, I will not provide additional examples of the problems of interpretation that these statutes entail.

<sup>95</sup> Someone might argue that the answer to this question is of little significance, for, in any case, the aforementioned conduct is lawful regardless of whether it doesn’t constitute an offense or is justified. This fails to grasp the communicative significance of the offense/justification distinction. It surely is not trivial whether society considers that injuring an animal as a result of scientific or agricultural practices has more in common with the act of shooting at a piece of paper (conduct that does not constitute an offense) than with the act of shooting a person in self-defense (justifiable conduct). Therefore, it seems to me that an answer to this question is warranted.

type of conduct is justified, for justifications are defenses to crimes. Furthermore, it might be argued that since the Montana statute asserts that “nothing in this section prohibits” injuring animals as a result of agricultural practices, engaging in such conduct does not even satisfy the elements of the offense.

This type of analysis strikes me as formalistic and unenlightening. It is clear that these statutes purport to exclude certain activities that are harmful to animals (scientific experiments and agricultural practices) from the reach of the criminal law. I do not believe, however, that much should be read into the specific way in which legislatures have drafted such exceptions. Whether the statute declares the lawfulness of such conduct by asserting that it “is a defense to the crime” or by claiming that the act is “not prohibited” by the law is immaterial to the question about whether the legality of the conduct stems from the fact that it is not constitutive of an offense or from its justifiable nature.

Since the offense/justification distinction is supra-statutory in nature, I believe that a more satisfying answer to the aforementioned question can be obtained by appealing to the heuristic devices that I have described in the previous sub-section. It is to this matter that I now turn.

## 2. HARM, REASONS AND REGRET IN ANTI-CRUELTY STATUTES

### a. HARMFUL LEGAL ACTS AND ANTI-CRUELTY STATUTES

By now it should be clear that there is a difference between non-harmful and harmful legal acts. Conduct that does not satisfy the elements of an offense does not typically cause harm (i.e. shooting at a piece of paper). However, justified conduct usually causes harm, although the harm avoided by engaging in the act is greater than the one inflicted (shooting at a person in self-defense). Thus, the first question that one should ask when examining the nature of the exemption of punishment that is afforded to those who injure animals pursuant to scientific or agricultural practices is whether those acts are lawful because they do not cause harm or because the harm that they inflict is outweighed by the benefits that are reaped by engaging in the conduct. The following examples might help us to answer this question.

- (1) Judy decides to dislocate a rabbit's neck because she enjoys seeing animals suffer.
- (2) Judy decides to dislocate a a rabbit's neck pursuant to a bona fide scientific experiment.
- (3) Judy decides to dislocate a rabbit's neck in order to slaughter the creature and sell it in a commercial establishment pursuant to local laws.

The conduct in example number (1) is clearly criminal under most, if not all, modern anti-cruelty statutes. Thus, the harm that is caused to the

rabbit is most certainly relevant for the criminal law. The conduct in example (2), on the other hand, is undoubtedly lawful under the traditional animal cruelty statute. It would be mistaken, however, to believe that the legality of such conduct stems from the fact that the harm caused to the rabbit is legally irrelevant. As example (1) demonstrates, the infliction of harm to rabbits matters for the criminal law. It would thus be odd to assume that the fact that the rabbit is injured pursuant to a bona fide scientific activity magically erases the harm caused to the creature.

Consequently, it makes better sense to conclude that the exemption from punishment afforded in example (2) is the product of a determination that the conduct is lawful because the harm endured by the animal is outweighed by the potential benefits of engaging in the scientific experimentation. Of course, one might disagree with the relative value that the law assigns to the interests in conflict in such cases. Many, including myself, believe that the harm caused to the rabbit should be given much more weight than what is currently the case. However, this disagreement does not prove that the injury caused to the rabbit in such cases does not “count” as harm for the criminal law. It merely demonstrates that such harm does not “count” as much as I, and most animal law scholars, believe that it should.

The conduct in example (3) should be treated in much the same way as the act in example (2). There is nothing magical about food production that



makes the harm caused to the rabbit in example (3) any different from the harm caused to the animal in example (1). The harm caused in both cases is identical: the dislocation of a rabbit's neck. The infliction of this harm, *qua* harm, remains unwelcome. However, the conduct in example (3) is lawful because the benefits generated by the act (production of food) is deemed to outweigh the harm caused to the animal.

An examination of these hypotheticals reveals that the reason why injuring an animal pursuant to agricultural or scientific activities is lawful is *not* because doing so does not constitute an offense, for such acts harm an interest protected by the criminal law. These acts are legal because they are justified, for, even though the harm that they cause matters for the criminal law, it is (rightly or wrongly) outweighed by countervailing considerations.

#### b. "REASONS" AND ANTI-CRUELTY STATUTES

Another way of probing the structure of animal cruelty statutes is by examining whether those that harm animals pursuant to certain enumerated activities act lawfully because there are no reasons for prohibiting such conduct or because, despite there being reasons against performing such acts, they are counterbalanced by the reasons that we have in favor of engaging in the conduct. If the former explanation for the lawfulness of the conduct is accurate (there are no reasons against performing the act), then it should be concluded that the causation of harm to animals as a result of

scientific or agricultural activities is not constitutive of an offense. However, if the latter explanation for the non-wrongfulness of the conduct is correct (reasons in favor of performing the act outweigh reasons against), then engaging in such acts is lawful because it is justified. An examination of the examples put forth in the previous sub-section is once again useful to a discussion of these matters.

I believe that example (1) demonstrates that animal cruelty statutes provide us with reasons against injuring animals. If Judy were to ask Andy whether she should dislocate a rabbit's neck, Andy would be able to point out that anti cruelty statutes give her good reasons to abstain from doing so. In other words, such statutes provide us with *prima facie* reasons against injuring an animal. On the other hand, examples (2) and (3) show that animal cruelty statutes also provide us with reasons in favor of harming animals (scientific experiments and food production) that might outweigh the *prima facie* reasons that the law affords against engaging in such conduct (keeping animals free from harm).

It should be noted, however, that it invites confusion to state that the presence of reasons in favor of performing the conduct wipe away the reasons against engaging in the act. Asserting that the law provides no reasons against dislocating a rabbit's neck if such harm takes place as a result of scientific experimentation or food processing practices would be

misleading. It makes better sense to conclude that, despite the fact that we have good reasons not to dislocate a rabbit's neck, those reasons are outweighed if the injuries occur pursuant to certain lawful activities.

These reflections corroborate that engaging in conduct that falls within the purview of the exceptions that plague anti-cruelty statutes is lawful because it is justified, not because it is not constitutive of an offense. Consequently, although the law affords Judy with valid grounds to injure an animal pursuant to scientific or food processing activities, the fact that doing so is constitutive of an offense still provides her with residual reasons against performing the justified conduct. However, given that these residual reasons (keeping the animal free from harm) are not of sufficient weight to counterbalance the reasons in favor of engaging in the act that the presence of justificatory circumstances provide (scientific advancement, food processing), dislocating the rabbit's neck is considered legal in such circumstances.

#### c. REGRET AND ANTI-CRUELTY STATUTES

The residual reasons that remain against harming an animal even in circumstances when doing so would be justified pursuant to some lawful activity provide us with sufficient motives to regret having had to cause the harm, even if doing so was justifiable. The rational force of such regret should lead us to seek other less harmful alternatives to achieving the ends

that we aimed to accomplish by injuring the animal.

Thus, Judy should first attempt to obtain whatever knowledge she wishes to attain by injuring the rabbit by engaging in scientific experiments that do not involve harm to animals. I think that this belief is shared by most people. Even if the majority of the population believes that it is justifiable to harm animals in order to advance science, many people are disturbed by the suffering that such activities cause to animals. The bulk of the populace regrets the harm that is inflicted to these animals and would thus prefer that, if possible, other less injurious alternatives be used in order to achieve scientific advancement. Similarly, we have reason to regret harming animals pursuant to food processing activities. As a result, most people would probably prefer that those in charge of engaging in such activities seek the least harmful methods to achieve the desired end.

The fact that we have good reason to regret harming animals pursuant to scientific and agricultural activities buttresses the conclusion that engaging in such conduct is lawful because it is justified, not because it does not satisfy the elements of an offense. As I have stated before, conduct that is lawful because it does not satisfy the elements of an offense (shooting at a piece of paper) is typically not regrettable. However, conduct that is lawful because it is justified (shooting a person in self-defense) is generally regrettable. Thus, it makes more sense to conclude that injuring an

animal in order to advance scientific knowledge or to produce food has more in common with the act of shooting at a person in self-defense than with the act of shooting at a piece of paper.

As has been demonstrated, both the acts of harming an animal pursuant to one of these activities and of shooting a person in self-defense inflict harm that is relevant for the criminal law. Furthermore, they are lawful because the reasons in favor of engaging in the act outweigh the reasons against performing the conduct, not because there are no reasons to abstain from engaging in the act in the first place. As a result, we have reason to regret both harming animals and shooting at human beings, even if doing so would be justifiable. This, in turn, generates reasons that should lead us to seek less injurious alternatives to attain the end that we would accomplish by engaging in the justified conduct.

The following table summarizes the conclusions that have been advanced up to this point:

Table 1. The Structure and Communicative Meaning of Anti-Cruelty Statutes

The Categories	The Act-Description	The Communicative Significance
The Offense	Causing injury to a non-human animal	<p>A person who infringes the offense has:</p> <ol style="list-style-type: none"> <li>1. harmed an interest that the criminal law seeks to protect</li> <li>2. performed conduct that is, all things being equal, wrongful</li> <li>3. engaged in conduct that we have reasons to refrain from performing</li> <li>4. performed conduct that we have reason to regret</li> </ol>
The Justifications	<ol style="list-style-type: none"> <li>1. Bona fide Scientific Experimentation,</li> <li>2. Farming, Agricultural and Food Processing Practices,</li> <li>3. Hunting, Fishing, and Trapping Practices</li> <li>4. Pest Control,</li> <li>5. Others.</li> </ol>	<p>A person who justifiably infringes the offense has:</p> <ol style="list-style-type: none"> <li>1. harmed an interest that the criminal law seeks to protect, but the harmed caused is outweighed by the benefits generated by the conduct,</li> <li>2. performed conduct that is, all things being considered, not wrongful,</li> <li>3. reasons for engaging in the conduct that outweigh the reasons against performing the act,</li> <li>4. performed lawful conduct that we nevertheless have reason to regret</li> </ol>

#### D. WHY THE ANIMAL LAW SCHOLAR'S CLAIM IS WRONG

An understanding of the conceptual structure of anti-cruelty offenses reveals that the interpretation of such laws typically afforded by animal law scholars is misguided. Once one differentiates between the inculpatory (the

offense) and exculpatory (the justifications) dimensions of these laws, one can see why it is not true that, as Professor Bryant has argued, the harm caused to animals as a result of the activities that are exempted from punishment under the typical anti-cruelty statute “simply doesn't count in legal terms”.

As has been argued, acts that are considered lawful pursuant to one of these exemptions remain harmful even though they are justified. It is thus mistaken to conclude that the harm inflicted to animals pursuant to justifiable activities does not “count” as legally relevant harm. The presence of justificatory circumstances (advancement of agricultural or scientific activities) *does not* wipe away the harm caused by the conduct. What these exemptions truly reveal is that there are countervailing reasons that society considers to be of sufficient weight to justify engaging in *prima facie* wrongful conduct that causes harm to animals, not that the offense was not designed to protect animals in the first place. Therefore, the thesis advanced in this article – that the chief reason why we create anti-cruelty offenses is to protect animals from the infliction of harm – is not incompatible with the exemptions contemplated in the typical animal cruelty statute.

E. WHY ALL OF THIS SHOULD MATTER TO AN ANIMAL RIGHTS ACTIVIST

Up to this point, I have attempted to demonstrate that the interpretation that many animal law scholars have made of the exemptions that plague anti cruelty statutes is misguided because it conflates the inculpatory and exculpatory dimensions of such laws. I will now (very) briefly sketch why such an interpretation is also objectionable on pragmatic grounds.

The reading of anti cruelty statutes that I have criticized here is probably the product of the fundamental disagreement that many animal law scholars have with the myriad reasons that such laws provide as justifications for infringing the offense. For them, the fact that the exemptions that plague these statutes leaves an inordinate number of acts that are harmful to animals unpunished demonstrates that the real purpose of these laws is to protect human activities that cannot be accomplished without injuring animals.

Although I am also outraged by many of the justifications that these statutes provide for inflicting harm to animals, I believe that those who defend the position that I have attempted to debunk here have failed to understand what seems intuitively obvious to most people – that society has called for the creation of anti-cruelty offenses as a way of protecting animals, not as a vehicle for perpetuating the exploitation of such



creatures.<sup>96</sup> In my opinion, it is a strategic blunder to ignore that, as Jerrold Tannenbaum has correctly pointed out, people “virtually universally” accept the proposition that “the primary purpose of [anti-cruelty] laws is to protect animals.”<sup>97</sup> Thus, instead of decrying statutes that criminalize animal abuse as another example of how animals are treated as “fungible” and “disposable” goods,<sup>98</sup> we should argue against the existence of the many exemptions that plague such laws by tapping into the basic sentiment that has led people to call for the enactment of anti-cruelty statutes in the first place.

## CONCLUSIONS

### A. STATUTES CRIMINALIZING HARMFUL CONDUCT AGAINST ANIMALS DO NOT PRIMARILY SEEK TO PROTECT PROPERTY INTERESTS

The conclusion that anti-cruelty statutes do not primarily seek to further property interests will strike some as provocative. Many, if not most, animal law scholars have accepted Professor Francione’s contention that “as far as the law is concerned, animals are nothing more than commodities”.<sup>99</sup> Thus, the proposition that animals are for all relevant legal purposes treated as property is generally accepted.

While this might very well be the case in the non-criminal context, it

---

<sup>96</sup> Robert Garner, *Animal Welfare: A Political Defense*, 1 *Journal of Animal Law and Ethics* 161, 171-172 (2006).

<sup>97</sup> Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty, Rights*, 62 *Soc. Res.* 539, 580 (1995).

<sup>98</sup> Bryant, *supra* note 66, at 76.

doesn't ring true as far as the penal law is concerned. Although a property-based conception of anti-cruelty statutes prevailed during much of the 19<sup>th</sup> Century, since then there has been an irreversible trend towards criminalizing animal abuse regardless of questions of property. Under modern animal cruelty statutes, pet owners are generally not free to harm their animals. Furthermore, they typically cannot consent to letting their animals being harmed by someone else. These propositions are at odds with a property-based conception of such laws.

Some believe that the only way of giving to animals the protection that they deserve lies in changing their legal status from property to persons. In an attempt to convince people that this shift in the juridical status of animals is necessary, scholars have traditionally appealed to extra-legal philosophical arguments. While these theoretical avenues are certainly worth pursuing, I believe that the seeds of the "personhood" of animals can already be found in modern animal cruelty laws. As far as anti-cruelty statutes are concerned, animals are being treated like persons in a very important way—they qualify as victims worthy of being protected by the criminal laws *irrespective of their property status in the non-criminal law context*.

---

<sup>99</sup> Francione, *supra* note 45.

B. HARM TO ANIMALS IS NOT CRIMINALIZED PRIMARILY AS A MEANS OF  
ENFORCING MORALITY

A second conclusion that can be drawn from the foregoing discussion is that, although mistreating animals is certainly immoral, it should not be contended that this is the principal reason for criminalizing the conduct. If there is one thing that the venerable harm principle stands for, it is the fact that an act should not be proscribed solely because it is deemed to be contrary to a moral principle. This contention is both compatible with the Supreme Court's decision in *Lawrence* and with the position held by most criminal law theorists.

C. CRIMINAL STATUTES THAT PROHIBIT HARM TO ANIMALS PRIMARILY  
SEEK TO PROTECT ANIMALS FROM BEING HARMED

The view that animal cruelty statutes seek to prevent harm to animals is both normatively appealing and descriptively illuminating. From a normative viewpoint, conferring legal protection to non-human sentient beings is a welcome development. If we can all agree that experiencing pain is something worth avoiding and that non-human animals have the capacity to be cognizant of such feelings, it follows that we should also protect them from the unjustifiable infliction of suffering.

From a descriptive standpoint it is also preferable to conceive anti-cruelty statutes as laws that are designed to prevent harm to animals. Both domestically and internationally, governments are banning activities that

cause harm to animals despite the fact that their performance sometimes commands considerable support from the populace. Thus, all state jurisdictions in the United States have criminalized dog and cock fighting over the objections of many. Similarly, bullfighting is banned in several countries once associated with the Spanish crown despite its rich historical roots.<sup>100</sup> These recent trends in anti-cruelty legislation are difficult to explain unless one believes that the chief purpose of criminalizing animal abuse is to prevent the unjustifiable suffering of animals. No alternative conception of animal cruelty laws comes close to explaining this increasingly important aspect of anti-cruelty legislation.

This does not necessarily mean, however, that anti-cruelty statutes were enacted *solely* for the purpose of protecting animals from harm. Undoubtedly, these laws, like many other criminal statutes (i.e. rape and murder statutes), also exist in partial recognition of the fact that most people consider that engaging in the prohibited conduct is morally reprehensible. Furthermore, it is likely that the decision to criminalize cruelty to animals was motivated to some extent by an interest in curbing future harm to humans and in preventing emotional pain to those with close ties to the creatures harmed. It might also be argued that some features of animal cruelty laws promote the preservation of certain property interests.

---

<sup>100</sup> In Latin America, bullfighting has been banned in Uruguay, Argentina, Chile and Cuba.

Nevertheless, I believe that the conclusion that the primary purpose of animal cruelty statutes is to protect animals from harm is inescapable. This conclusion is not contradicted by the fact that these laws contain exemptions that allow for the causation of harm to animals pursuant to certain lawful activities (scientific experimentation, agriculture, hunting, etc). An examination of the structure of anti-cruelty statutes reveals that the exempted activities promote interests that justify inflicting suffering on animals, not that laws criminalizing animal abuse were not designed to protect the creatures in the first place.

#### D. PEOPLE V GARCIA: A SECOND LOOK

Once it is understood that the principal purpose of anti-cruelty statutes is to prevent injury to animals, one can see why the decision in *People v. Garcia* cannot withstand close scrutiny. The court asked all of the wrong questions because it seemed to conceive animal cruelty statutes as laws that are designed either to prevent future harm to humans or to prevent emotional harm to those with close ties to the animal abused. The former conceptualization of animal cruelty statutes led the court to focus on the state of mind of the perpetrator in order to determine whether his act evinced a heightened level of cruelty. The latter characterization led the court to focus on the emotional harm caused to the custodian of the pet.

By misapprehending the nature and purpose of anti-cruelty statutes, the

court gave short thrift to the only being whose interests were sought to be protected by such legislation –the animal harmed- in this case, Junior the goldfish. Therefore, the question that should have been asked in *Garcia* is whether the instantaneous killing of a goldfish by stomping on him constitutes an act of simple or aggravated cruelty. The decisive consideration should thus be the amount of pain and suffering endured by the fish. As the amount of pain inflicted increases, the arguments in favor of considering the act to be one of aggravated cruelty get stronger. Contrarily, as the amount of pain and suffering decreases, the case in favor of a finding of aggravated cruelty weakens.

Reasonable minds might disagree with regards to whether the suffering endured by Junior was of such a degree to warrant a determination of aggravated cruelty. On the one hand, the defendant's contention that the fish did not suffer because he was killed instantly seems to point in the direction of not considering this act to be one of extreme cruelty. On the other hand, it might be argued that the killing of a being constitutes the supreme act of cruelty. If that were the case, a finding of aggravated cruelty would be warranted.

Regardless of whether one believes that the defendant should have prevailed in his arguments, there is little doubt with regards to who was the real victim of the Court's analysis in *Garcia* –a little goldfish named Junior.